Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of: **Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances (Web V)**	**Docket No. 19-CRB-0005-WR (2021-2025)**

THE NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE'S CORRECTED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Witness Name	Description	Party	Trial Exhibit	Citation Format
Blatter, Steven	Written Direct Testimony of Steven Blatter	Sirius XM/ Pandora	4093	Blatter WDT
Burkhiser, Jennifer	Written Direct Testimony of Jennifer Burkhiser	NRBNMLC	3062	Burkhiser WDT
Cordes, Joseph	Corrected Written Direct Testimony of Joseph Cordes	NRBNMLC	3061	Cordes CWDT
Emert, Joseph	Written Direct Testimony of Joseph Emert (*Web IV*)	NRBNMLC	3063	Emert WDT (*Web IV*)
Gille, Andrew	Written Direct Testimony of Andrew Gille	NAB	2156	Gille WDT
Harrison, Aaron	Written Direct Testimony of Aaron Harrison	SoundExchange	5609	Harrison WDT
Harrison, Aaron	Written Rebuttal Testimony of Aaron Harrison	SoundExchange	5610	Harrison WRT
Hauser, John	Written Direct Testimony of John Hauser	NAB	2151	Hauser WDT
Leonard, Gregory	Corrected Written Direct Testimony of Gregory Leonard	NAB	2150	Leonard CWDT
Newberry, Steven	Written Direct Testimony of Steven W. Newberry	NAB	2155	Newberry WDT
Orszag, Jon	Written Direct Testimony of Jon Orszag	SoundExchange	5602	Orszag WDT
Orszag, Jon	Written Rebuttal Testimony of Jon Orszag	SoundExchange	5603	Orszag WRT
Pfifer, Dan	Written Rebuttal Testimony of Dan Pfifer	Google	1104	Pfifer WRT
Pittman, Robert	Written Direct Testimony of Robert Pittman	NAB	2152	Pittman WDT

Witness Name	Description	Party	Trial Exhibit	Citation Format
Ploeger, Travis	Written Rebuttal Testimony of Travis Ploeger	SoundExchange	5625	Ploeger WRT
Steinberg, Richard	Amended Written Direct Testimony of Richard Steinberg	NRBNMLC	3060	Steinberg AWDT
Steinberg, Richard	Corrected Written Rebuttal Testimony of Richard Steinberg	NRBNMLC	3064	Steinberg CWRT
Tucker, Catherine	Written Direct Testimony of Catherine Tucker	SoundExchange	5604	Tucker WDT
Tucker, Catherine	Written Rebuttal Testimony of Catherine Tucker	SoundExchange	5605	Tucker WRT
Wheeler, Leonard	Written Direct Testimony of Leonard Wheeler	NAB	2157	Wheeler WDT
Willig, Robert	Corrected Written Direct Testimony of Robert Willig	SoundExchange	5600	Willig CWDT

I. THE NRBNMLC AND ITS WITNESSES

1. On February 1, 2019, the National Religious Broadcasters Noncommercial Music License Committee ("NRBNMLC") filed a Petition To Participate in this proceeding on behalf itself and the noncommercial radio stations that it represents that make, or are considering making in the 2021-2025 license term, public performances of sound recordings by digital transmission and ephemeral recordings in furtherance thereof pursuant to sections 112(e) and 114(d)(2) of the Copyright Act (collectively, "Statutory Licenses"). *See* The NRBNMLC's Petition To Participate (Feb. 1, 2019). The NRBNMLC is a subcommittee of the National Religious Broadcasters Music License Committee, which is a standing committee of the National Religious Broadcasters. *Id.* It submitted testimony from two expert witnesses and one fact witness, each of whom testified at the hearing, as well as designated testimony from the *Web IV* proceeding from Joseph Emert, the Founder and President of Life Radio Ministries, Inc. *See* Corrected Written Direct Statement of the NRBNMLC (Jan. 6, 2020).[1]

A. Expert Witnesses

2. ***Professor Richard Steinberg, IUPUI***. Professor Steinberg is a Professor of

Economics and Philanthropic Studies at Indiana University Purdue University Indianapolis (IUPUI), where he served as the Chair of Philanthropic Studies for several years and also helped to develop three interdisciplinary graduate degree programs at IUPUI in Philanthropic Studies and Nonprofit Management. Steinberg AWDT ¶¶ 1-2. He has devoted virtually all of his research and numerous publications to the economics of nonprofit organizations and their pricing strategies and other behaviors. *Id.*

[1] Pursuant to 37 C.F.R. § 351.14(c), paragraphs 1, 12-30, 112-20, 123-24, 126-27, 130, 132-34, 150, 155, 163, 246-47, 260, and 266 constitute proposed conclusions of law.

¶ 1. Professor Steinberg served as the President of the Association for Research on Nonprofit Organizations and Voluntary Action for two years. *Id*. ¶ 4. He also has authored or edited five books and authored or coauthored twenty-nine publications relating to the economics and pricing behavior of nonprofits in academic journals, including the American Economic Review, RAND Journal, Journal of Public Economics, Nonprofit and Voluntary Sector Quarterly, and Nonprofit Management and Leadership. *Id*. ¶ 3; 8/26/20 Tr. 3990:16-3991:7 (Steinberg). He holds a Ph.D. in Economics from the University of Pennsylvania and an undergraduate degree in Economics from MIT. Steinberg AWDT ¶ 1. Professor Steinberg submitted written direct and rebuttal testimony, and he testified before the Judges on August 26, 2020. 8/26/20 Tr. 3986:23-4084:19 (Steinberg). The Judges qualified Professor Steinberg as an expert in economics, the economics of nonprofit organizations, applied microeconomics, and applied econometrics. *Id.* at 3991:17-25.

3. ***Professor Joseph J. Cordes, The George Washington University***. Professor

Cordes is a Professor of Economics and Public Policy and Administration in the Department of Economics and the Trachtenberg School of Public Policy and Public Administration of The George Washington University. Cordes CWDT ¶ 1. He has served as the Chair of the Economics Department and Director and Associate Director of the Trachtenberg School of Public Policy and Public Administration. *Id*. Professor Cordes focuses specifically on the economics of the nonprofit sector, and he teaches courses on economics in policy analysis, cost-benefit analysis, and public finance. *Id*. ¶ 3. He is the past Chair and current Co-Chair of the Nonprofit Finances Section of the Association for Research on Nonprofit Organizations and Voluntary Action, and currently serves on the Research Advisory Network of the National Consortium on Nonprofit Enterprise. *Id*. ¶ 2; Tr. 8/20/20 3252:13-3252:25 (Cordes). He is a member of the American Economic Association, the

Association for Public Policy Analysis and Management, and the Association for Budgeting and Financial Management. Cordes CWDT ¶ 2. He has authored or co-authored articles in scholarly journals, edited a book on nonprofits and business, and contributed chapters on tax policy and non-profits, uses of benefit-cost analysis to evaluate the impacts of nonprofit organizations, social enterprise, and nonprofit entrepreneurship. *Id.* ¶¶ 4, 5. Professor Cordes holds a Ph.D. and a Master's Degree in Economics from the University of Wisconsin-Madison and a Bachelor's degree in Economics from Stanford University. *Id.* ¶ 1. Professor Cordes submitted written direct testimony, and he testified before the Judges on August 20 and August 24, 2020. 8/20/20 Tr. 3250:2-3284:23, 3298:19-3346:3 (Cordes). The Judges qualified Professor Cordes as an expert in economics, the economics of nonprofit organizations, applied microeconomics, and applied econometrics. *Id.* at 3253:18-25.

B. NRBNMLC Fact Witness and Designated Testimony

4. ***Jennifer Burkhiser, Family Stations, Inc. (aka "Family Radio")***. Jennifer Burkhiser is the Director of Broadcast Regulatory Compliance and Issues Programming at Family Radio, where she handles music license royalties, other intellectual property matters, and network broadcast compliance regarding FCC regulations. Burkhiser WDT ¶ 1. She also directs local public affairs programming for each station and hosts Family Radio's national public affairs program, Community Bridge. *Id.* ¶¶ 1, 6. Ms. Burkhiser has seventeen years of experience in noncommercial and commercial radio and serves on the NRBNMLC's Board. *Id.* ¶¶ 2, 6. For over sixteen years she has mentored at-risk children in her community and received the Excellence in Mentoring Award from the Governor of Iowa. *Id.* ¶ 7. Ms. Burkhiser hold a Master of Arts in Communications with an emphasis in broadcast regulations from the University of Nebraska at Omaha and a Bachelor of Arts in Communication Arts from Bellevue

University. *Id*. ¶ 1; 8/31/20 Tr. 4749:1-3 (Burkhiser). Ms. Burkhiser submitted written direct testimony and testified before the Judges on August 31, 2020. *Id.* at 4747:9-4806:10.

5. ***Joseph C. Emert, Life Radio Ministries, Inc.*** Mr. Emert is the Founder and served as the President of Life Radio Ministries, Inc. in Griffin, Georgia. Emert WDT (*Web IV*) ¶¶ 1, 5. He began working in Christian Radio at the age of 18 and has been actively involved in Christian broadcasting for over 50 years. *Id*. ¶ 2. Life Radio Ministries' mission is to serve listeners with programming that includes biblical teaching, culture-changing information, and music that offers spiritual encouragement, contains a Christ-centered focus, and consists of a mix of Inspirational, Light Christian contemporary, praise, worship, hymns, and gospel. *Id*. ¶¶ 8, 12. For over twenty-five years, Life Radio Ministries has operated NewLife FM, which broadcasts talk and teaching content as well as music to the Atlanta and Macon communities. *Id*. ¶¶ 5, 7, 9.

6. ***SoundExchange Witnesses.*** SoundExchange presented live testimony from four witnesses who discussed noncommercial religious broadcasters: Jonathan Orszag, Professor Catherine Tucker, Aaron Harrison, Senior Vice President, Business & Legal Affairs, Digital at UMG Recordings, Inc., and Travis Ploeger, SoundExchange's Director of License Management . *See* Orszag WDT & WRT; Tucker WDT & WRT; Harrison WDT & WRT; Ploeger WRT.

C. Family Radio

7. Family Stations, Inc. also known as "Family Radio," is a noncommercial mission-driven Christian radio and streaming ministry. Burkhiser WDT ¶ 9; 8/31/20 Tr. 4750:22 – 4751:5 (Burkhiser). Family Radio has been on the air for over 60 years and operates a network of 50 noncommercial broadcast stations and 40 FM translators reaching over 80 million listeners in 30 states. Burkhiser WDT ¶ 9; 8/31/20 Tr. 4750:22-4751:5 (Burkhiser). Family Radio is driven by its mission "to teach and educate about the Bible and provide encouragement to [its] listeners" and is "almost entirely donor-supported." *Id.* at 4750:20-4751:20. All of Family

Radio's stations provide local programming specific to each community. Burkhiser WDT ¶ 9; 8/31/20 Tr. 4751:6-9 (Burkhiser). All programming is linked to Family Radio's educational mission and Reformed theological doctrine. Burkhiser WDT ¶ 51; 8/31/20 Tr. 4751:14-16 (Burkhiser). Family Radio offers mixed format, educational, Bible-focused programming consisting of approximately 35% talk and teaching content and 65% music on weekdays and 25% talk and teaching content and 75% music on weekends. Burkhiser WDT ¶ 11.

8. Family Radio airs a variety of talk, news, and teaching programming to keep "its listeners informed of local and national issues," to share inspiring stories of everyday Americans and prayer requests, and to provide educational content on topics such as practical living, family life, the interplay between science and the Bible, and the Bible itself. *Id.* ¶¶ 16-17; 8/31/20 Tr. 4755:12-16 (Burkhiser). Ms. Burkhiser hosts a program called "Community Bridge," which "engages listeners in identifying and solving community problems" and covers such topics as mass shootings, supporting new parents, youth participation in the arts, human trafficking, and affordable housing. Burkhiser WDT ¶ 18; 8/31/20 Tr. 4748:20-23; 4755:16-4756:3 (Burkhiser). Family Radio offers air time to programming providers and local community groups without charge and, since 2012, has offered 45,000 hours of free air time. Burkhiser WDT ¶ 19; 8/31/2020 Tr. 4751:16-24 (Burkhiser).

9. Family Radio's music is hymn-based and "not based on widespread popularity." Burkhiser WDT ¶ 14; 8/31/20 Tr. 4752:18-4753:1 (Burkhiser). Rather, Family Radio carefully selects its music to ensure that it reflects its Bible-centered mission and reformed theology. Burkhiser WDT ¶ 14; 8/31/20 Tr. 4752:18-4753:1 (Burkhiser). "Artist selection … is secondary always." *Id.* at 4753:2-6.

10. Since 2010, Family Radio has simulcast its programming to enable its listeners to connect with Family Radio's ministry and biblical content. Burkhiser WDT ¶ 23; 8/31//20 Tr.

4757:2-6 (Burkhiser). Family Radio does not pay for any of its non-music content; the only license fees it pays are for the music that it transmits. *Id.* at 4757:7-11; Burkhiser WDT ¶ 37.

11. While simulcasting has been a useful tool, increased digital sound recording performance rates have financially harmed Family Radio. *Id.* ¶¶ 34, 37. Family Radio is one of the nineteen noncommercial religious broadcasters most harmed by the current rate structure. It is not an outlier like [[[redacted]]] but rather ranks [[[redacted]]] out of the twenty noncommercial webcasters who paid fees for exceeding the monthly threshold of 159,140 aggregate tuning hours ("ATH"). Ploeger WRT App. E.

II. HISTORY OF NONCOMMERCIAL RATE-SETTING

A. The Section 114 Statutory License Requires the Judges To Distinguish Among Different Types of Services.

12. The section 114 statutory license mandates that the rates and terms set by the Copyright Royalty Judges "shall distinguish among the different types of services then in operation." 17 U.S.C. § 114(f)(1)(B) (emphasis added). Congress' consistently different – and preferential – treatment of noncommercial broadcasters as compared with commercial services provides clear evidence that Congress viewed noncommercial broadcasters as a different type of service that should be subject to different rates from commercial services, as discussed below.

B. Congress Consistently and Repeatedly Has Made Clear that Noncommercial Broadcasters Are To Be Given Favored Status.

1. The Public Broadcasting Act

13. Congress has a long history of providing special treatment to noncommercial broadcasters. As far back as 1967, Congress enacted the Public Broadcasting Act to benefit noncommercial broadcasters. *See* 47 U.S.C. § 390 (stating that the objectives of the legislation were, among other things, to "extend delivery of public telecommunications services to as many citizens of the United States as possible by the most efficient and economical means, including

the use of broadcast and nonbroadcast technologies," and to "strengthen the capability of existing public television and radio stations to provide public telecommunications services to the public"). This law provides noncommercial broadcasters with federal grants for telecommunications facilities that are unavailable to commercial broadcasters. *See, e.g., id.* §§ 391-392. Congress specifically provided that "[o]f the sums appropriated …, a substantial amount shall be available for the expansion and development of noncommercial radio broadcast station facilities." *Id*. § 393. These noncommercial "public broadcasters" were not limited to stations affiliated with National Public Radio ("NPR") but were broadly defined to include all noncommercial radio stations "owned and operated by a … nonprofit private foundation, corporation, or association," among others. *Id*. § 397(6).

2. The Section 118 License

14. Similarly, as part of the 1976 overhaul of the Copyright Act, Congress created a statutory license according noncommercial broadcasters preferential treatment for their broadcasting of musical works. *See* 17 U.S.C. § 118; 37 C.F.R. §§ 381.1-381.11. Under the license, the Judges set rates that are reasonable if the parties are unable to agree to those rates. 17 U.S.C. §§ 118(b)(4); 801(b)(1). The related House Judiciary Committee Report stated:

> The Committee is cognizant of the intent of Congress, in enacting the Public Broadcasting Act on November 7, 1967, that encouragement and support of noncommercial broadcasting is in the public interest. It is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as <u>the special nature of programming</u>, repeated use of programs, and, of course, <u>limited financial resources</u>. Thus, the Committee determined that <u>the nature of public broadcasting does warrant special treatment in certain areas</u>.

H.R. Rep. No. 94-1476, at 117 (1976) (emphasis added). Thus, specifically in the context of music licensing, Congress chose to confer a particular benefit on noncommercial broadcasters due to their non-profit missions, unique programming, and limited finances.

3. The Small Webcaster Settlement Act and Subsequent Webcaster Settlement Acts

15. Congress continued its special treatment of noncommercial entities in the context of the very right at issue in this proceeding: the right of digital public performance of sound recordings. In 2002, it enacted the Small Webcaster Settlement Act ("SWSA") in response to the outcry from noncommercial webcasters against the rates set by the Copyright Arbitration Royalty Panel ("CARP") in *Web I*. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002) ("SWSA"). The SWSA enabled noncommercial and other licensees to negotiate lower sound recording royalty rates than those established in *Web I* – even though the *Web I* noncommercial broadcaster rate itself was 2/3 lower than the commercial rate set in that proceeding. *Id*.; *infra* Part II.C.1.

16. Congress again enacted two iterations of similar legislation following the issuance of the Judges' royalty determination in *Web II* that again enabled noncommercial and other licensees to negotiate lower rates than those that the Judges had set – even though again, the Judges set lower rates for noncommercial webcasters than for commercial entities. *See* Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008); Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (2009).

* * *

17. These repeated rounds of legislation establish that Congress intended that noncommercial broadcasters be subject to different – and lower – rates than those that apply to commercial entities, consistent with section 17 U.S.C. § 114(f)(1)(B).

C. The Marketplace Behavior of Noncommercial Licensees Regarding Each Round of Noncommercial Webcasting Rates Shows that Those Rates Did Not Sufficiently Distinguish this Separate Category of Buyer and Did Not Reflect Rates that Both Sellers and Buyers Would Agree to, as the Statute Requires.

18. The Judges and their predecessors have set different – and lower – rates under the Statutory Licenses for noncommercial services than for commercial services in each

webcasting proceeding to date – to a degree. *See infra* Part II.C.1-4. The marketplace behavior of noncommercial services with respect to those rates, however, reveals that the rates have reflected the seller-side perspective but have not adequately account for the perspective of noncommercial buyers. The rates thus do not reflect rates that both willing sellers and willing noncommercial buyers would jointly agree to in the marketplace, as the statute commands. *See* 17 U.S.C. § 114(f)(1)(B) (requiring that rates and terms "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller"); *id*. § 112(e)(4) (same).

1. *Web I*

19. In the first webcasting proceeding following creation of the section 114 statutory license ("*Web I*"), covering the license term of October 28, 1998 through 2002, the CARP found that "[a]pplying the same commercial broadcaster rate to non-commercial entities affronts common sense." *Report of the Copyright Arbitration Royalty Panel*, Docket No. 2000-9 CARP DTRA 1 & 2, at 89 (Feb. 20, 2002) ("*CARP Report*"). Quoting a prior CARP, it observed that "[u]nlike commercial broadcasters, programming costs are not automatically accommodated," as "[c]ontributions … remain voluntary." *Id*. (quotation marks and citation omitted). It agreed with the prior CARP that "commercial license rates almost certainly overstate fair market value" and "can not appropriately be used as a benchmark" for noncommercial broadcasters. *Id*.

20. The CARP set noncommercial rates based on an offer that had been made by willing sellers – namely, the recording industry – to set noncommercial rates at a level equal to 1/3 of – or a 2/3 discount from – the commercial rate. That translated into a rate of $0.0002 per performance for noncommercial simulcasters. *Id*. at 89, 93. That rate for noncommercial simulcasting was affirmed by the Librarian of Congress. *Determination of Reasonable Rates*

and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings: Final Rule and Order, 67 Fed. Reg. 45240, 45259, 45272 (July 8, 2002) ("*Web I*").

21. Noncommercial and small commercial webcasters strongly disputed the *Web I* rates and lobbied Congress for relief. *See Notification of Agreement Under the Small Webcaster Settlement Act of 2002*, 68 Fed. Reg. 35008, 35008 (June 11, 2003) ("*Noncommercial SWSA Agreement*"). As Senator Helms observed in considering legislation to rectify the high *Web I* rates, "the resultant royalty was so high and the rate structure so inflexible that the majority of small webcasters feared that it would lead to their demise," including noncommercial webcasters. 148 Cong. Rec. S11548-01, S11548-49 (daily ed. Nov. 19, 2002) (statement of Sen. Helms). He further observed:

> As the distinguished chairman of the Senate Judiciary Committee stated at a May 2002 hearing on this subject, Congress did not intend to bankrupt small webcasters when it created this new royalty.

Id. at S11549.

22. "In response to those concerns, Congress passed the Small Webcaster Settlement Act of 2002," which authorized noncommercial and small commercial webcasters and SoundExchange to negotiate alternative rates and terms and suspended the payment due date for noncommercial webcasters to enabled them to negotiate more affordable alternative rates. *Noncommercial SWSA Agreement*, 68 Fed. Reg. at 35008; SWSA, Pub. L. No. 107-321 (2002). "The legislation reflect[ed] a compromise for all the parties directly affected by this legislation," including "small webcasters, noncommercial webcasters, and hobbyists that could not survive with the rates set by the Librarian." 148 Cong. Rec. S11725, S11726 (daily ed. Nov. 20, 2002) (statement of Sen. Leahy).

23. Following passage of the SWSA, noncommercial webcasters negotiated nonprecedential alternative – and lower – rates with SoundExchange that applied from October

28, 1998 through 2004. *See Noncommercial SWSA Agreement*, 68 Fed. Reg. at 35009-12.[2] The noncommercial rates set in *Web I* thus had no adverse economic impact on noncommercial licensees. Noncommercial webcasters' strong opposition to the *Web I* rates and their success in negotiating lower rates following passage of the SWSA demonstrates that the *Web I* rates did not reflect what noncommercial willing buyers would agree to in the marketplace.

2. *Web II* (2006-2010)

24. The rates set in *Web II* similarly did not reflect the rates that willing noncommercial services would negotiate with sellers. The Judges found that "up to a point, certain 'noncommercial' webcasters may constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than" those applicable to commercial webcasters. *Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order*, 72 Fed. Reg. 24084, 24097 (May 1, 2007) ("*Web II*"). They also found that "[a] segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity" and that "each demand curve exhibits a different price elasticity of demand." *Id*. They nonetheless adopted the suggestion of a SoundExchange witness to impose a listener-based cap as "a proxy for assessing the convergence point between Noncommercial Webcasters and Commercial Webcasters" to limit this submarket to reduce the risk of alleged cannibalization by noncommercial services of listeners to commercial services. *Id.* at 24099-100. The Judges therefore adopted a threshold rate structure under which noncommercial webcasters must pay (a) $500 to stream up to 159,140 monthly aggregate tuning hours ("ATH") and (b) for the first time – the same full per-performance rates that were applicable to commercial services. *Id*. at 24111.

[2] Those rates were further extended by legislation through 2005. Pub. L. No. 108-419, 118 Stat. 2341, 2370 (2004).

25. As in *Web I*, those rates were heavily contested by noncommercial licensees, which again sought relief from Congress. In response, Congress passed the Webcaster Settlement Act of 2008 and a follow-on Act in 2009 (collectively, "WSAs"), which allowed noncommercial and other webcasters to negotiate alternative agreements with SoundExchange for up to an 11-year period, from 2005 through 2015. *See* Pub. L. No. 110-435, 122 Stat. 4974, 4974-75 (2008); Pub. L. No. 111-36, 123 Stat. 1926, 1926 (2009); 17 U.S.C. § 114(f)(5)(A) (authorizing agreements to cover "a period of not more than 11 years beginning on January 1, 2005").

26. Noncommercial religious webcasters negotiated a nonprecedential alternative agreement under the WSAs that set rates for a ten-year term – 2006-2015. That agreement set noncommercial rates consisting of a monthly ATH allotment and per-performance rates for additional webcasting that were much lower than the published rates. *Notification of Agreements Under the Webcaster Settlement Act of 2009*, 74 Fed. Reg. 40614, 40626 (Aug. 12, 2009) ("*2009 WSA Agreement Rates*"). National Public Radio, Inc. ("NPR") also was not willing to pay the published rates and terms and negotiated its own alternative agreements covering the ten-year term. *Id.* at 40620-24 (2011-2015); *Notification of Agreements Under the Webcaster Settlement Act of 2008*, 74 Fed. Reg. 9293, 9294-99 (Mar. 3, 2009) (2005-2010) ("*2008 WSA Agreement Rates*"). These alternative agreements ensured that virtually no noncommercial webcasters actually paid commercial per-performance rates for webcasting above the specified ATH threshold, so *Web II* had no adverse economic impact on these webcasters. Again, noncommercial webcasters' strong opposition to the *Web II* rates and their repeat success in negotiating lower rates following passage of the WSAs demonstrates that the *Web II* rates did not reflect what noncommercial willing buyers would agree to in the marketplace.

3. *Web III* (2011-2015)

27. The noncommercial WSA agreements reached in the wake of *Web II* covered the *Web III* term as well, so there was virtually no participation by noncommercial webcasters. *See supra* ¶ 26. In that proceeding, the Judges carried forward the same rate structure they had adopted in *Web II* for noncommercial webcasters. *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order*, 79 Fed. Reg. 23102, 23121, 23124, 23128 (Apr. 25, 2014) ("*Web III Remand*"). The determination, however, carried very little economic significance given the alternative WSA agreements.

4. *Web IV* (2016-2020)

28. In the most recent proceeding, there was significant noncommercial participation, as the WSA agreements were set to expire at the end of 2015. SoundExchange agreed to settle with two of the participating noncommercial broadcasters – NPR and College Broadcasters, Inc. ("CBI"), representing student-run stations. *See* TX 3000 (CBI); TX 3021 (NPR); *Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV): Final Rule and Order*, 81 Fed. Reg. 26316, 26317 (May 2, 2016) ("*Web IV*"). Both agreements were largely similar to prior agreements that these broadcasters had reached under the WSA. *Compare* TX 3021 *with 2009 WSA Agreement Rates*, 74 Fed. Reg. at 40620-24 (NPR); *compare* TX 3000 *with 2009 WSA Agreement Rates*, 74 Fed. Reg. at 40614, 40616-20 (CBI). SoundExchange, however, refused to settle with the NRBNMLC, forcing noncommercial religious broadcasters to litigate. *Web IV*, 81 Fed. Reg. at 26316-17.

29. The Judges again carried forward the same rate structure, requiring noncommercial services to pay (a) $500 to webcast up to 159,140 monthly ATH and (b) full commercial per-performance rates to webcast above that threshold. *Id.* at 26396. That determination adopted SoundExchange's seller-side proposed noncommercial structure in its

entirety. *Compare id*. at 26391 (summarizing SoundExchange's noncommercial proposal) *with id*. at 26396 (setting forth noncommercial rate structure). The evidentiary record did not include a single noncommercial benchmark agreement indicating that a noncommercial webcaster would be willing to pay full commercial rates above a threshold. *Id.* at 26395.

30. Unlike the three prior determinations, *Web IV* had a severe economic impact on larger noncommercial broadcasters not covered by the NPR agreement, which consist largely – but not exclusively – of religious broadcasters. Ploeger WRT App. C. For the first time in the history of the statutory license, non-NPR noncommercial broadcasters were required to pay commercial per-performance rates for webcasting above the ATH threshold, as there were no other available alternatives. *Web IV*, 81 Fed. Reg. at 26396. The *Web IV* determination more than doubled those per-performance rates from $0.00083 in 2015 to $0.0017 in 2016. *Compare 2009 WSA Agreement Rates*, 74 Fed. Reg. at 40626 *with Web IV*, 81 Fed. Reg. at 26400. Those rates would have tripled if the commercial broadcaster per-performance rates had not been reduced by about one-third over those same two years. *Compare Web III Remand*, 79 Fed. Reg. at 23131 (setting 2015 commercial broadcaster per-performance rate at $0.0025) *with Web IV*, 81 Fed. Reg. at 26409 (setting commercial per-performance rate at $0.0017).

31. This sharp rate increase has fallen most heavily on noncommercial religious broadcasters. While SoundExchange continued to be willing to settle on terms consistent with prior agreements with the other two significant groups of noncommercial broadcasters – NPR and CBI – with respect to 2016-2020 rates, it refused – for the first time – to settle with noncommercial religious broadcasters for that period. *See id*. at 26317, 26396. As a result, religious broadcasters – virtually alone – have been required since 2016 to pay commercial per-performance fees. Specifically, nineteen of the twenty noncommercial licensees paying per-performance fees in 2018 were religious broadcasters. Ploeger WRT ¶ 46. Moreover, usage fee

payments by religious broadcasters represent [[[redacted]]] of overall noncommercial payments made in 2018 under the rates determined by the Judges. *Id*. App. E ([[[redacted]]]). Overall fees paid by above-threshold religious broadcasters also represent nearly [[[redacted]]]% of noncommercial fees paid overall by non-settling noncommercial entities. *Id.* App. A ¶ 33; TX 5068 ([[[redacted]]]).[3] Thus, the hardship of this structure ironically has fallen most heavily on those religious broadcasters who have been most effective in fulfilling their missions by having the greatest listener outreach.

D. Fee Disparity Resulting from the *Web IV* Determination

32. The *Web IV* determination and disappearance of an alternative rate option for noncommercial religious broadcasters as of 2016 has resulted in approximately a threefold or larger disparity between the average per-Music ATH fees charged to NPR-affiliated noncommercial broadcasters and the average fees charged to larger non-NPR-affiliated noncommercial broadcasters. In 2018, NPR, through the Corporation for Public Broadcasting ("CPB"), paid $560,000 to webcast 285,132,065 Music ATH. 37 C.F.R. §§ 380.32(a), 380.33(a) (2018); TX 3021 at 9-10.[4] For comparative purposes, those metrics amount to an average fee per Music ATH of $0.00196 ($560,000 / 285,132,065).

33. That same metric can be calculated for noncommercial licensees who paid usage fees in 2018. In that year, twenty noncommercial licensees, representing [[[redacted]]] stations or channels, paid usage fees. TX 5068. Minimum fees for these licensees were $[[[redacted]

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[3] There appears to be an error in the 2018 minimum fees that SoundExchange witness, Travis Ploeger, reported for [[[redacted]]] in Appendix E of his Written Rebuttal Testimony. *Compare* Ploeger WRT App. E ($[[[redacted]]] in minimum fees) *with* TX 5068 ($[[[redacted]]] in minimum fees). The calculations here use TX 5068 data.

[4] Throughout these Proposed Findings, all citations to pages of trial exhibits refer to the pagination stamped on the exhibit for trial, not the internal pagination of the native document.

[redacted]]]. *Id.*; Ploeger WRT App. E. Usage fees were $[[[redacted]]], and total fees were $[[[redacted]]]. TX 5068; Ploeger WRT App. E.

34. If one conservatively assumes that each channel webcast the maximum amount of ATH permitted by the minimum fee payment (which would reduce the fee disparity between the two groups), the ATH allotment covered by the minimum fee is [[[redacted]]] ([[[redacted]]] channels * 159,140 ATH/channel-month * 12 months). TX 5068; Ploeger WRT App. E. Assuming that an average of 12 sound recordings per ATH are transmitted (a common estimate for broadcast programming (Ploeger WRT ¶ 40)), the ATH represented by the usage fees paid by this group is [[[redacted]]]. TX 5068; Ploeger WRT App. E. The total ATH permitted by the fees paid by this group is [[[redacted]]].

35. Using these numbers, the average fee per ATH for usage-fee-paying non-NPR noncommercial licensee is $0.00555 [[[redacted]]]. The fee disparity fee disparity between what this group and noncommercial NPR broadcasters pay for the same amount of music use is **283%** ($0.00555 / $0.00196) – a nearly threefold difference.

36. Notably, the disparity is not attributable to allegedly lower music use by NPR stations; the NPR Agreement on its face only charges for “Music ATH,” which the parties considered to be music-intensive programming. 37 C.F.R. § 380.32(a) (2018); TX 3021 at 9; TX 3022 (SoundExchange valuation of NPR Agreement using estimate of [[[redacted]]] sound recordings per hour).

37. The fee disparity likely is much higher than 283% because the evidence shows that NPR stations may have come closer to their cap than did non-NPR stations. SoundExchange estimated that NPR had, in fact, [[[redacted]]] its 285,132,065 Music ATH allotment in 2018. In a document considering [[[redacted]]] data, it observed for 2018 that “[[[redacted]]

[redacted]]]." TX 3041. It estimated NPR's Music ATH use in 2018 at [[[redacted]]] – [[[redacted]]] the cap. *Id*. By contrast, the above-threshold non-NPR broadcasters consumed the full monthly ATH allotment in only [[[redacted]]] of the [[[redacted]]][5] channel-months in 2018. Ploeger WRT App. E; TX 5068 (showing that only [[[redacted]]] reported months by usage-fee-paying noncommercial broadcasters exceeded 159,140 ATH).

38. If one assumes full ATH consumption by NPR and 75% ATH threshold consumption in the months where broadcasters did not exceed the threshold, the fee disparity between the two groups increases to <u>336%</u>.[6] *Id.*; Ploeger WRT App. E. If one assumes 50% consumption in those months, the disparity increases to over fourfold – <u>412%</u>.[7] TX 5068; Ploeger WRT App. E.

E. Severe Impact of Rates on Family Radio

39. Family Radio is one of the 19 noncommercial religious broadcasters most harmed by the current structure and the fee disparity versus NPR. Ploeger WRT ¶ 46 & App. E. "Since Family Radio began streaming in 2010 and until 2016, it always had paid streaming rates that resulted from a voluntary agreement that the NRBNMLC reached with SoundExchange – not rates set by the Copyright Royalty Judges." Burkhiser WDT ¶ 26. In 2015, those rates consisted of a $500 minimum annual fee for 159,140 ATH per month plus $0.00083 per performance above the ATH threshold. *2009 WSA Agreement Rates*, 74 Fed. Reg. at 40626.

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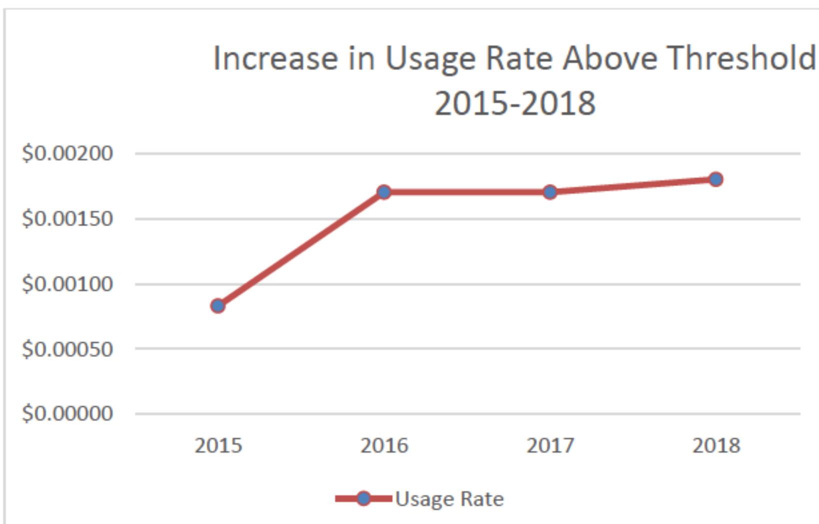
[5] [[[redacted]]] = [[[redacted]]] channels * 12 months.

[6] Estimated minimum fee ATH consumed is [[[redacted]]]. Estimated total ATH is [[[redacted]]]. The average fee per ATH is $0.00658 [[[redacted]]]. The fee disparity is 336% ($0.00658 / $0.00196). TX 5068; Ploeger WRT App. E.

[7] Estimated minimum fee ATH consumed is [[[redacted]]]. Estimated total ATH is [[[redacted]]]. The average fee per ATH is $0.00808 [[[redacted]]]. The fee disparity is thus 412% ($0.00808 / $0.00196). TX 5068; Ploeger WRT App. E.

40. For the first time in 2016, Family Radio was forced to pay commercial rates for streaming above the 159,140 threshold. *See* Burkhiser WDT ¶ 27 ("Thus, for the first time in nearly seventeen years, noncommercial broadcasters not part of NPR or CBI had no alternative but to pay the much higher rates set in *Web IV* … ."). While the $500 minimum annual fee for 159,140 ATH per month remained the same, the above-threshold per-performance rate jumped from $0.00083 to the full commercial per-performance rate of $0.0017, increasing to $0.0018 for 2018-2020. 37 C.F.R. § 380.10(a); Burkhiser WDT ¶ 28.

41. As the following table shows, "Family Radio's usage rates for streaming above the 159,140 monthly threshold more than doubled between 2015 and 2016 alone as a result of the first-time application of commercial streaming rates to Family Radio's biblical, educational, ministry-focused content." *Id.*



42. "Had there not been a substantial decrease in commercial per performance rates between 2015 and 2016, Family Radio's per-performance rates would have tripled." *Id.* *Compare* 37 C.F.R. § 380.12(a)(5) (2015) (requiring commercial broadcasters to pay $0.0025/performance) *with* 37 C.F.R. § 380.10(a)(1) (2016) (requiring commercial nonsubscription services to pay $0.0017/performance).

43. The increase in streaming rates hurt Family Radio more because it has decreased its broadcast footprint by 50 signals from 2015-2018, which made simulcasting the sole means for listeners in those areas to access its ministry. 8/31/20 Tr. 4758:7-22 (Burkhiser); Burkhiser WDT ¶ 34. This has increased Family Radio's costs because it did not previously have to pay fees to reach those listeners over the air. Those increased costs have "posed a perplexing Catch 22" for Family Radio as it considers how best to steward its resources to operate its ministry. *Id.*

III. NONCOMMERCIAL BROADCASTERS OF ALL SIZES CONSTITUTE A DISTINCT MARKET SEGMENT FROM – AND HAVE DIFFERENT WILLINGNESS TO PAY AS COMPARED WITH – COMMERCIAL SERVICES.

44. Charging noncommercial broadcasters the same rates as commercial services for above-threshold webcasting is not economically justified. "Economists who study the nonprofit sector have identified several defining features of nonprofit organizations which make their marketplace behavior different from commercial entities when purchasing goods and services." Cordes CWDT ¶ 14; 8/20/20 Tr. 3255:20-25 (Cordes). Nonprofit entities have "different objectives, constraints, and revenue sources than for-profit enterprises." Steinberg AWDT ¶ 15. "These differences affect nonprofit willingness-to-buy and thus affect the price in contracts between willing buyers and willing sellers." *Id.*; 8/26/20 Tr. 3998:15-19 (Steinberg) ("Because the objectives of nonprofits are different, the constraints are different. All the predictions we would make about their behavior, what they are willing to pay for a license, all of those things are distinct from that of for-profits."). Specifically, noncommercial webcasters occupy a different market segment from – and "will have a lower willingness to pay for license fees" – than commercial webcasters. 8/20/20 Tr. 3256:1-3 (Cordes); 8/26/20 Tr. 3998:15-19 (Steinberg); Cordes CWDT ¶ 16.

A. Nonprofit Objectives and Behaviors Different from For-Profit Objectives and Behaviors in Ways that Affect Their Willingness To Pay and Place Them in a Separate Market Segment.

1. The Nondistribution Constraint Imposed on Noncommercial Webcasters Limits Access to Capital and Induces Webcasters To Pursue Less Profitable Activities, Which Reduce Willingness To Pay.

45. "[T]he objective of for-profit commercial enterprises – including commercial radio broadcasters – is to maximize their profits and distribute them to their shareholders." Burkhiser WDT ¶ 45; 8/31/20 Tr. 4768:16-19 (Burkhiser) ("[F]or-profit webcasters and broadcasters can keep the money earned, the entities and owners can for their own enrichment and benefit, and they can walk away."); Cordes CWDT ¶ 14 ("for-profit businesses['] … strategic objective is to maximize profits").

46. "[T]he defining structure as a corporate structure is that a nonprofit organization is an organization that can make profits or financial surpluses, but cannot distribute these profits to shareholders or owners." 8/26/20 Tr. 3996:7-11 (Steinberg); 8/20/20 Tr. 3263:9-20 (Cordes) ("[T]hat constraint prohibits the distribution of surplus to shareholders or to individual owners."); Cordes CWDT ¶ 15. The nondistribution constraint "is a defining characteristic of all nonprofits, regardless of size." 8/20/20 Tr. 3264:13-18 (Cordes).

47. The nondistribution constraint "is built into the state corporation laws under which they are incorporated." 8/26/20 Tr. 3996:12-13 (Steinberg); Steinberg AWDT ¶ 14 ("[A]ll state nonprofit corporation statutes shared the restriction that their profits cannot be distributed….").

48. The constraint also is "recognized under the federal tax laws as a requirement for tax exemption and tax deductibility." 8/26/20 Tr. 3996:12-15 (Steinberg); Steinberg AWDT ¶ 14; 26 U.S.C. § 501(c)(3) ("no part of the net earnings of" a tax-exempt nonprofit may "inure to the benefit of any private shareholder or individual"); Cordes CWDT ¶ 15. As Professor Steinberg testified:

> The nondistribution constraint ensures that all financial surplus (generated through donations, sales of goods and services, and various other minor revenue sources) is dedicated to the charitable mission of the organization. Even on dissolution, remaining financial surplus must be donated to another nonprofit organization with the closest possible mission to ensure that no financial surplus inures to the benefit of anyone who controls the use of organizational assets.

Steinberg AWDT ¶ 14; 8/26/20 Tr. 3998:8-11 (Steinberg).

49. "[B]ecause profits can't be distributed, there are no shareholders. The Board of Directors has no financial interest in what the nonprofit does." *Id.* at 3996:22-25; Cordes CWDT ¶ 15 ("[A] nonprofit does not have any owners."). With no threat of takeover bids and "[w]ith no shareholders demanding return on their investment, nonprofits are free to pursue their charitable and educational missions subject only to the need to remain solvent." Steinberg AWDT ¶ 15. The nondistribution constraint thus often induces them "to pursue charitable missions that are not rewarded in the marketplace." 8/26/20 Tr. 3996:16-18 (Steinberg); *id.* at 3997:1-4.

50. The nondistribution constraint also restricts funding sources available to nonprofits to finance their operations. Specifically, it forecloses access to equity markets because nonprofits cannot distribute gains to shareholders. *Id.* at 3997:9-15 ("[T]here's no access to traditional equity capital. They can't issue shares of stock that pay dividends."); 8/20/20 Tr. 3265:4-6 (Cordes) ("[B]ecause, in fact, you have no owners, there is no equity in a nonprofit organization, it's foreclosed from seeking capital in equity markets."); Cordes CWDT ¶ 17. The constraint "also may pose some challenges to [nonprofits] raising debt capital, because … it may limit the amount of collateral that they may be able to pledge in exchange for – for debt financing." 8/20/20 Tr. 3265:7-10 (Cordes).

51. Noncommercial broadcasters necessarily are subject to the same nondistribution constraint that applies to all tax-exempt nonprofits. *See* 26 U.S.C. § 501(c)(3); Burkhiser WDT ¶ 44. The constraint is seen in Family Radio's Articles of Incorporation, which specify that the

entity is "not organized for the private gain of any person." TX 3016 at 3; 8/31/20 Tr. 4768:14-15 (Burkhiser). "All donations and income that Family Radio receives are reinvested back into the corporation for ministry growth, station upgrades and repairs, salaries and similar expenses; its owners and operators are not able to realize a profit from this income." Burkhiser WDT ¶ 56; 8/31/20 4768:8-13 (Burkhiser).

52. "[T]he limited access to capital and the fact that … there are no owners that can … capture the surplus, those two factors together from an economic perspective would lower the willingness to pay for – on the part of non-commercial broadcasters for license fees." 8/20/20 Tr. 3265:4-16 (Cordes). Specifically, the removal of shareholder pressure to maximize profits incentivizes nonprofits to pursue activities that are inherently less lucrative and lowers nonprofit entities' willingness to pay. 8/26/20 Tr. 3997:1-4 (Steinberg); Cordes CWDT ¶ 16. Further, the "limited sources of financing likely would reduce a nonprofit buyer's willingness to accept higher prices for sound recording performance royalties than would commercial entities, who have more financing mechanisms available to them to fund their profit-making efforts." *Id.* ¶ 17.

2. Noncommercial Broadcasters' Required Focus on Achievement of Mission over Profit Maximization Also Reduces Their Willingness To Pay for License Rights Vis-à-vis Commercial Entities.

53. "[U]nlike for-profit businesses whose strategic objective is to maximize profits, the strategic objective of nonprofits is achievement of <u>mission</u>." *Id.* ¶ 14. In other words, nonprofit organizations "have as a strategic goal the achievement of a social purpose rather than the maximization of profit or the maximization of shareholder value." 8/20/20 Tr. 3259:9-14 (Cordes). Achievement of mission is a characteristic "inherent in all nonprofits" and includes activities such as "helping get out the vote," "providing shelter to the homeless," "feeding the poor," or, [i]n the case of non-commercial religious broadcasters, it would be to both nourish the faith of their listeners and to educate their listeners in various aspects of their faith." *Id.* at

3260:24-3261:12; *see also* Cordes CWDT ¶ 14; 8/26/20 Tr. 3999:19-22 (Steinberg) ("[M]issions differ across nonprofits, but they generally involve either educating [listeners] about their faith, supporting them in their faith, or other such things.").

54. Nonprofit entities, "in fact, are – under many state corporate laws and federal tax laws – required to serve one or more exempt purposes with their mission." *Id.* at 3996:19-21. Federal law, for example, requires nonprofit entities to be "organized and operated exclusively for" specified non-profit purposes, including "religious," "charitable," and "educational" purposes, to be eligible for tax-exempt status. 26 U.S.C. § 501(c)(3); *accord* Cordes CWDT ¶ 14.

55. Noncommercial broadcasters, as nonprofits, similarly are required to pursue a mission-driven purpose. *See, e.g.*, 26 U.S.C. § 501(c)(3); Burkhiser WDT ¶ 44. This mission focus is seen in Family Radio's Articles of Incorporation, which states that "[t]he property of this corporation is irrevocably dedicated to religious and charitable purposes." TX 3016 at 6; *see also* Burkhiser WDT ¶ 44 ("Family Radio is a ministry whose mission is to promote biblical teaching and to encourage listeners in their spiritual walks."); 8/31/20 Tr. 4751:3-5 (Burkhiser).

56. Examples of missions pursued by noncommercial broadcasters also may be seen on the Form 990 "Return of Organization Exempt from Income Tax," which tax-exempt noncommercial broadcasters and other nonprofit entities file with the Internal Revenue Service ("IRS"). For example, religious broadcasters have identified their missions as "to equip people with the truth of God's Word to be maturing followers of Christ who are making disciples around the world" (TX 3053 at 45), "to be the voice of hope connecting people more deeply to God" (TX 5239 at 1), and "to extend the reach of Christian community, by affirming that which is positive in our culture, and penetrating our world as salt and light with the life-transforming Gospel of Jesus Christ" (TX 5241 at 1). *See also* Emert WDT (*Web IV*) ¶ 8; TX 5237 at 30. A

secular noncommercial broadcaster has identified its mission as "to make the mind more curious, the heart more open, and the spirit more joyful through excellent audio programming that is deeply rooted in New York." TX 3075 at 1.

57. Noncommercial broadcasters' required commitment to mission is reinforced by license requirements that the Federal Communications Commission ("FCC") separately imposes on them. 47 C.F.R. § 73.503(a), (d). "A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program." *Id.* § 73.503(a); Steinberg AWDT ¶ 18; Cordes CWDT ¶¶ 18, 26; Burkhiser WDT ¶ 47; 8/31/20 Tr. 4763:6-9 (Burkhiser) ("[Family Radio is] licensed to the educational FM band, AM band, and … we have to have non-commercial educational programming."); 8/20/20 Tr. 3261:25-3262:11 (Cordes). "Each station shall furnish a nonprofit and noncommercial broadcast service." 47 C.F.R. § 73.503(d); Burkhiser WDT ¶ 47; Cordes CWDT ¶¶ 18, 26.

58. The FCC also bars noncommercial broadcasters from selling advertisements, which further ensures that it will be devoid of profit-making content. 47 C.F.R. § 73.503(d) ("No <u>promotional</u> announcement <u>on behalf of for profit entities</u> shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees."); 8/26/20 Tr. 3997:9-22 (Steinberg) (observing that noncommercial broadcasters "agree that they will not sell any advertising and the program must be educational and non-commercial in nature").

59. These mission-oriented restrictions on programming "directly affect the fundamental character of the programming that may be offered by a noncommercial radio broadcaster versus a commercial broadcaster," render it inherently less profitable, and lowers noncommercial broadcasters' willingness to pay for inputs to that programming "to a level that is

significantly below that of commercial for-profit webcasters." Steinberg AWDT ¶¶ 19-20; Cordes CWDT ¶ 19; Burkhiser WDT ¶ 46.

a. Profit-Maximizing Commercial Programming

60. For commercial webcasters, "[w]illingness to buy is based solely on profit maximization, which requires picking a mix of songs, broadcast and webcast options, and formats that maximize the listening audience. This is because advertising revenue is directly proportional to listenership." Steinberg AWDT ¶ 19. Professor Steinberg further testified:

> A commercial webcaster has a willingness to pay or to buy the rights for transmissions that is part and parcel of its goal of profit-maximization. This means they want to maximize the number of listeners because this helps them earn revenues from advertising. And their programming decisions are based on maximizing listenership in the demographic groups most attractive to advertisers. They come to a willing buyer/willing seller agreement based on these factors.

8/26/20 Tr. 3999:3-12 (Steinberg); Steinberg AWDT ¶ 19; Burkhiser WDT ¶ 45 ("[T]he objective of for-profit commercial enterprises – including commercial radio broadcasters – is to maximize their profits and distribute them to their shareholders.").

61. Commercial webcasters are not subject to the same programmatic restrictions that apply to noncommercial broadcasters, so they are free to pursue profit-maximization aggressively. *Id.* ¶ 52. Given the focus on profit maximization, commercial programming is filled with ads and "does have a profit-oriented flavor and … drive, motivation. You might hear more entertaining, popular music, content selected that way to see if they'll get more listeners, more profitability." 8/31/20 Tr. 4763:20-4764:1 (Burkhiser).

62. "Even commercial Christian radio stations that do include inspirational content make programming decisions with an eye toward profitability rather than from a sole mission-oriented focus of encouraging their listeners and, unlike our programming, are infused with a commercial profit-oriented flavor given the extensive advertisements that they air." Burkhiser WDT ¶ 53. As Ms. Burkhiser described:

> I'm very familiar with both commercial and non-commercial Christian broadcasting. I listened to commercial Christian broadcasting in my area in the past, and now we don't have that available over the broadcast. But I've also heard them streaming on-line. And I would say it's - it's very different. Those who really listen to Christian music and – and radio stations can tell the difference between commercial and non-commercial pretty easily. <u>You will hear kind of a whole profit-infused flare in the commercial stations, not only in the advertising you hear, even to the extent of, you know, advertising like gambling ads that … you would think you wouldn't hear on a religious station</u>, but even the way that the DJs speak. Definitely a different - a different feel. And, certainly, … there's a big difference in motivation and just the programming content based on the two different drivers, profit or mission.

8/31/20 Tr. 4764:5-24 (Burkhiser) (emphasis added). Those broadcasters actively solicit advertising on their websites. TX 3074 at 1 (Commercial Christian Cumulus station webpage soliciting businesses to "Advertise With Us"); *id*. ("The coordinated advertising campaign that delivers results. <u>Guaranteed</u>."); TX 3073 at 1 (Salem webpage soliciting businesses to "Let our experienced team of professionals guide you through the process of creating meaningful, effective campaigns to touch the hearts and minds of your target audience."); TX 3071 at 1 ("Advertise your business on Aggieland's hit Christian station").

b. Non-Profit and Mission-Driven Noncommercial Programming

63. For noncommercial webcasters, by contrast, "willingness to buy rights comes from the pursuit of mission. And they don't just want a body count. Sometimes they are even willing to give up some listeners. What they want is to make a difference in the lives of listeners." 8/26/20 Tr. 3999:13-18 (Steinberg). As Professor Steinberg observed:

> In contrast, NCE webcasters solve a different economics problem, that of mission maximization. NCE willingness to buy is based on choosing the song mix, webcast options, and formats that best advance the educational and charitable mission of the station. It is important that the NCE attract the right kind of listener, listening for the right reasons, and changing behaviors, knowledge, and beliefs in response to what they hear.

Steinberg AWDT ¶ 19. Programming thus is based on its effect on listeners and on reaching the right listeners, not maximizing listenership in demographic groups popular with advertisers. *Id.*

¶ 52 ("FCC regulations requiring NCEs to advance an[] educational program and restricting NCE advertising revenues provide a strong presumption that the two submarkets do not overlap."); Emert WDT (*Web IV*) ¶ 36 ("[W]e provide a ministry to our listeners to enrich their lives and further our educational and spiritual missions, and any desire on our part to reach more listeners is driven by a desire to benefit them, not profit from them.").

64. "This core distinction between mission-driven and profit-driven entities manifests itself in numerous ways that make [noncommercial broadcasters] less willing to pay for products at the same prices charged to commercial entities …. ." Burkhiser WDT ¶ 45. Moreover, the educational nature of noncommercial broadcast programming and inability of those broadcasters to sell ads necessarily makes their product less profitable, which lowers their willingness to pay. *See* Steinberg AWDT ¶¶ 19-20. As Professor Cordes explained, "[b]ecause advertising is a particularly important revenue source for commercial broadcasters, its prohibition as a source of revenue for noncommercial broadcasters is yet another factor that would lower those broadcasters' willingness to pay commercial prices. Cordes CWDT ¶ 20.

65. Consistent with its required exclusive focus on mission, Ms. Burkhiser testified that "we make all of our programming decisions based on … our mission. That motivates us. The Bible, our reformed theology." 8/31/20 Tr. 4763:12-14 (Burkhiser). Noncommercial broadcasters' talk and teaching programming is carefully chosen to align with their mission and theology. Burkhiser WDT ¶ 48 ("In adherence to these requirements, our non-profit programming decisions are made to further our mission, and Family Radio employs a rigorous process in selecting its programming and the syndicated ministries with whom it chooses to partner."). As Ms. Burkhiser testified regarding Family Radio:

> It is of paramount importance to us that our programming align with our mission and the Bible, and we carefully vet potential partners' statements of faith, adherence to Reformed conservative theology, and biblical principles related to

> operations before deciding whether to form broadcast partnerships with such entities.

Id. Topics covered are educational and religious and include: "marriage, family life, and practical living"; "the interplay between science and the Bible"; "Bible study and teaching" and Bible reading; "children's programs"; and "everyday life, how to deal with issues going on and how the Bible specifically relates to that." *Id.* ¶ 13; 8/31/20 Tr. 4751:25-4752:12 (Burkhiser); Emert WDT (*Web IV*) ¶ 11.

66. Noncommercial broadcasters sometimes even affirmatively eschew receiving programming revenues that they would be able to receive if doing so would more effectively advance their mission – which is precisely the opposite of how a for-profit company would act:

> we care so much about the content that we offer all our air time to programming providers – programming providers and the local community groups in each community that we broadcast to without charge. In fact, specific public affairs local programming, we've offered over 45,000 hours of free air time since 2012. That's how important our mission is.

8/31/20 Tr. 4751:17-24 (Burkhiser); Burkhiser WDT ¶ 48 ("We are so committed to entering into the right partnerships with other ministries that we do not charge our partners for air time in our 90-signal network even though we are foregoing a significant source of income in doing so.").

67. Music programming offered by noncommercial religious broadcasters exhibits a similar mission focus. As Ms. Burkhiser testified regarding Family Radio, which plays hymns:

> Song selection is an equally important component of our programming decisions. Like the programs that we decide to air, song lyrics must align with Family Radio's mission and Reformed understanding of the Bible.

Id. ¶ 51. That music is chosen based on whether the songs will advance the noncommercial broadcaster's mission, not based on popularity:

> It's all based on whether … the Bible is reflected or reformed theology is reflected … in the message. So we are very careful about the music we choose. We don't choose it based on popularity but the content. And we even reject music … if the content, even if it's Christian, isn't within those guidelines.

8/31/20 Tr. 4752:20-4753:1 (Burkhiser); *id*. at 4763:12-4764:1 ("We select even our … songs based on the lyrics, on the content, not the popularity. And … there's a lot of different genres out there, but we have hymns, and … that really reflects a lot of deep theology.").

68. Noncommercial broadcasters' focus on mission over profit maximization causes them to "view sound recordings as less important to achieving their overall mission than a commercial entity like Pandora would view sound recordings, which are a key input to its product." Cordes CWDT ¶ 16; Burkhiser WDT ¶ 51 (observing that "alignment with our theological parameters" of a song is "far more important to us than the specific recorded versions of those songs that we air or the artists who sing them"); 8/31/20 Tr. 4753:2-6 (Burkhiser) ("Certainly content is the most important thing. Artist selection … is secondary always.").

69. Consistent with the FCC's requirement, noncommercial broadcasters' programming is devoid of advertisements. 47 C.F.R. § 73.503(d); 8/31/20 Tr. 4763:6-11 (Burkhiser) ("So Family Radio … cannot have any kind of commercial. Non-commercial. So advertisements are prohibited."); 8/20/20 Tr. 3262:9-11 (Cordes); Steinberg AWDT ¶ 18; Burkhiser WDT ¶ 54; Cordes CWDT ¶ 20.

70. Noncommercial simulcast programming bears the same noncommercial educational characteristics as the corresponding broadcast programming. Burkhiser WDT ¶ 47 ("The programming that we stream over the Internet is the same as our broadcast programming and thus has the same educational character, function, and purpose as our broadcast programming."). Due both to its educational nonprofit nature and to its lack of commercial ads, noncommercial simulcast programming is not as financially lucrative as for-profit programming, which lowers non-profit broadcasters' willingness to pay. Cordes CWDT ¶ 16.

71. "[B]ecause of the distinctive traits of nonprofit broadcasters, they would have a higher price elasticity of demand. They would be more likely to buy the good when they

otherwise might not, if, in fact, the price were lowered to them." 8/20/20 Tr. 3267:10-14 (Cordes). As Professor Cordes testified, different noncommercial broadcaster "traits will influence how they behave in markets." *Id.* at 3255:18-25. "[N]onprofits will have a lower willingness to pay for license fees." *Id.* at 3256:1-3.

72. These different buyer-side traits resulting in a lower willingness to pay are sufficient – in and of themselves – to result in lower noncommercial fees before even addressing the seller side. 8/26/20 Tr. 4001:10-22 (Steinberg) (observing that with respect to "willingness to buy" and "willingness to sell," "[y]ou only need one to be different" between two market segments to result in a different market price). "[A]s long as there is different willingness to pay, there's a different market segment, and we would naturally expect different prices in each segment." *Id.* at 4002:19-24.

3. Noncommercial Broadcasters' Different Objectives and Constraints Result in Other Differences that Reduce Their Willingness To Pay.

73. Other differences driven by noncommercial broadcasters' different objectives and constraints similarly reduce those entities' willingness to pay. *Infra* Part III.A.3.a-b.

a. Differences in Revenue Sources

74. Noncommercial broadcasters' mission focus, and related inability to sell ads, results in different, and more limited, means of obtaining revenues to fund their operations, which reduces their willingness to pay. Steinberg AWDT ¶ 19. "Noncommercial broadcasters and webcasters simply do not have the ability to monetize their use of music in the same fashion as ... commercial webcasters." Burkhiser WDT ¶ 54; 8/31/20 Tr. 4766:5-6 (Burkhiser) ("So a nonprofit like Family Radio, we can't monetize music through ads.").

75. For-profit webcasters and broadcasters may sell ads that "directly promote business and goods and services in lots of different ways, calling out price information, calls to action, making qualitative statements about why the product is … so wonderful." *Id.* at 4766:7-

12; Burkhiser WDT ¶ 55 ("[A]dvertisements … can directly promote the businesses that buy the advertisements and their goods and services in a very promotional way. Specific brands and all kinds of qualitative statements about goods and services can be made in commercial messages.").

76. "These advertisements generally are keyed to audience size and increase more directly as audience increases." *Id.*; Steinberg AWDT ¶¶ 19, 20 ("[A]dvertising revenue is directly proportional to listenership."); 8/31/20 Tr. 4766:12-13 (Burkhiser) ("[T]he sale of advertisements increase more directly as the audience increases.").

77. By contrast, "[n]on-profit radio has no similarly reliable mechanism to increase funding to support additional listeners." Burkhiser WDT ¶ 55; 8/31/20 Tr. 4767:10-12 (Burkhiser). Noncommercial "webcasters receive the bulk of their revenues from donors … ." Steinberg AWDT ¶ 20. "But donations are limited because donations benefit a group of people. It's a classical public goods problem. And so any one can free ride off the donations of others, hoping that other donors pay and, as a result, each donor gives less than their willingness to pay in equilibrium." 8/26/20 Tr. 3998:1-7 (Steinberg); Steinberg AWDT ¶ 17 (observing that "[d]onative nonprofit organizations suffer from "philanthropic insufficiency" (Salamon, 1986) due to the well-known free rider problem," where "there is a natural tendency to let others donate while taking a free ride on the output.").

78. There is no "reason to believe that donations are proportional to broadcast listenership." *Id.* ¶ 20. "More importantly, it is unclear whether donations increase at all in response to <u>webcast</u> listenership … ." *Id.*

79. Noncommercial broadcasters may seek voluntary corporate donations in the form of underwriting sponsorships, but any on-air acknowledgments are strictly regulated by the FCC and cannot include price information, qualitative or promotional statements about goods or

services offered, or calls to action. Burkhiser WDT ¶ 54; Steinberg AWDT ¶ 51. As Ms. Burkhiser testified:

> nonprofit Family Radio … would be allowed to do underwriting of sponsorships, but we don't actively seek that out. … [I]f we did, our acknowledgments would just be -- they'd be limited to a thank-you, naming the sponsor, giving a general description. Very restricted in what we could say to thank the sponsor. No price information or calls to action, even, you know, can't even say it is for free, something, no qualitative or promotional statements.

8/31/20 Tr. 4766:20-4767:12 (Burkhiser). "Like other donations, they are limited by free-rider problems and do not grow proportionally with listenership," as advertising revenues do. Steinberg AWDT ¶ 51. "Thus, announcements made on behalf of business sponsors are nowhere near as valuable as those on commercial stations or webcasts, as businesses do not get the same promotional value from these announcements." Burkhiser WDT ¶ 54. This reduced ability to fund operations correspondingly reduces noncommercial broadcasters' willingness to pay. Steinberg AWDT ¶ 19.

b. Differences in Compensation

80. Noncommercial broadcasters' reduced willingness to pay extends to their labor force, where nonprofit employees are willing to accept lower compensation, or even volunteer, to further a nonprofit's mission. Burkhiser WDT ¶ 57 ("Based on my experience at Family Radio, our employees and Board members do not work for or on behalf of Family Radio to maximize their income. For example, Family Radio has had volunteers on its Board of Directors who donate their time and resources to serve the mission of Family Radio."). Ms. Burkhiser testified:

> In my experience as a manager on various levels in Family Radio, I've seen employees accept lower compensation, take on many hats to further the mission, and even donate to the mission. They really believe in it.

8/31/20 Tr. 4769:1-5 (Burkhiser); Burkhiser WDT ¶ 57.

81. By contrast, for profit employees, like the profit-driven companies for which they work, are more driven by salary levels. 8/31/20 Tr. 4769:6-9 (Burkhiser) ("And, of course, for-

profit webcasters and broadcasters, they have that ability to make profit, and so that motivates the labor force. Those … employees are driven by salary levels."); Burkhiser WDT ¶ 58 ("Given my experience interacting with people employed in the for profit sector, they are much more likely to be driven by salary levels than are employees of a non-profit ministry such as Family Radio. In other words, the differential focus on a non-profit entity's mission versus a for-profit's money-making ability is reflected in the respective labor forces as well.").

B. Different Market Segments Persist Regardless of Noncommercial Buyers' Size or Listenership.

82. None of the factors determining noncommercial broadcasters' willingness to buy are restricted to smaller entities. To the contrary, as Professor Cordes observed:

> the key attributes that define a nonprofit are commitment to mission and imposition of the nondistribution constraint. … These attributes are present even among large noncommercial broadcasters, whether measured by listenership or some other metric, and they are absent even among small commercial services.

Cordes CWDT ¶ 26. "There's no particular economic reason to believe" "that as they grow in size, … their attributes will converge to those of commercial broadcasters." 8/20/20 Tr. 3271:18-3272:2 (Cordes); *id.* at 3272:14-15 ("[T]here's no necessary connection between the nonprofit getting bigger and those attributes going away."); 8/31/20 Tr. 4773:9-14 (Burkhiser) ("[W]e are different than commercial services. No matter how – how many listeners you have or large you become, you still have the same restrictions on programming, on funding, purpose. It's just a completely different thing, no matter your size.").

83. Convergence of willingness to buy as a noncommercial webcaster grows in size or listenership is not expected under economic theory. Steinberg AWDT ¶ 58 ("The Judges have recognized that commercial rates beyond a threshold is only a proxy included to forestall overlap and convergence, and I have countered that there is no evidence that these things have occurred, and they are unlikely to occur according to economic logic.").

1. Commitment to Mission Persists Regardless of Size.

84. The requirement that tax-exempt nonprofits operate exclusively for nonprofit mission-based purposes does not lessen as nonprofits grow. 26 U.S.C. § 501(c)(3). "[T]here's no obvious connection between growing in size and a diminished commitment to mission. In fact, we have lots of large nonprofits that … everybody would regard as being quite committed to their mission." 8/20/20 Tr. 3272:2-6 (Cordes).

85. The requirement that noncommercial broadcasters offer noncommercial and educational programming also does not dissipate as those broadcasters grow in size or listenership. 47 C.F.R. § 73.503(a), (d). As Professor Cordes testified, "there's no reason why [a nonprofit's] commitment to education and in this case religious programming would change as it got larger." 8/20/20 Tr. 3272:16-21 (Cordes); Cordes CWDT ¶ 26. Thus, increased listenership does not render noncommercial programming a closer substitute to commercial programming. Rather, it remains differentiated. *Id.* ¶¶ 25-26.

86. The ban on selling ads similarly persists regardless of noncommercial growth. 8/20/20 Tr. 3272:1-15 (Cordes) (observing that broadcaster growth "does not remove … the legal requirements that … define what non-commercial broadcasters are, in particular, the prohibition against advertising."). That ban continues to foreclose even noncommercial broadcasters with large listenership from increasing their revenues in proportion to their listenership. Burkhiser WDT ¶ 37 ("Family Radio … is not able to increase its advertising revenues in proportion to audience growth to help manage the additional costs in the way that a commercial radio broadcaster would be able to do."); 8/31/20 Tr. 4760:24-4761:4 (Burkhiser).

2. The Nondistribution Constraint Persists Regardless of Size.

87. The nondistribution constraint "is a defining characteristic of all nonprofits, regardless of size." 8/20/20 Tr. 3264:13-18 (Cordes). "Clearly larger size does not remove the

non-distribution constraint as long as the entity wants to remain as a nonprofit." *Id.* at 3272:7-9. Rather, that constraint is "present even among large noncommercial broadcasters, whether measured by listenership or some other metric, and … absent even among small commercial services." Cordes CWDT ¶ 26. The persistence of this trait ensures that no profit motive will drive the nonprofit's business decisions and continues to foreclose equity, and limit debt, financing for nonprofits. 8/26/20 Tr. 3997:9-15 (Steinberg); 8/20/20 Tr. 3265:4-10 (Cordes); Steinberg AWDT ¶ 15. In short, "there's no necessary connection between the nonprofit getting bigger and those attributes going away." 8/20/20 Tr. 3272:13-15 (Cordes).

3. Payment at Commercial Rates for Usage Above 159,140 Monthly ATH Cannot Be Justified by Claiming that There Is a Single Market Segment Past that Point.

88. Given the persistence of distinctive noncommercial traits that decrease noncommercial broadcasters' willingness to buy regardless of listenership, charging noncommercial webcasters commercial rates above a monthly threshold of 159,140 is not justified by economics. Professor Steinberg confirmed as much when posed this issue:

> Q. And does your conclusion vary if non-commercial webcasters exceed a listenership threshold of, for example, the 159,140 monthly ATH that we see in the current regulations?
>
> A. No, because the non-commercial organizations, they may have more listeners, but they still have a different objective and a different constraint and, therefore, they have a different willingness to pay. So there's nothing about being larger that says our willingness to pay becomes identical with a for-profit. They are still governed by a non-distribution constraint that makes them nonprofit. So I don't accept the claim that the markets become one segment when the nonprofit – when the non-commercial becomes large.

8/26/20 Tr. 4002:25-4003:16 (Steinberg); Steinberg AWDT ¶ 24 ("None of the differences between NCE and Commercial webcasters discussed above changes when an NCE webcaster exceeds the number of listeners measured by the ATH. These differences exist and persist at all levels of listenership. Therefore, the penalty for alleged convergence (payment of commercial rates) is unrelated to any actual convergence.”).

4. Large Noncommercial Broadcasters Are Not More Likely To Compete with Commercial Services.

89. The persistence of noncommercial attributes regardless of size or listenership also ensures that noncommercial broadcasters do not become more likely to compete with commercial webcasters as they grow. As Professor Cordes testified:

> A. [I]f, in fact, you accept the proposition that there’s no reason why the commitment to mission should dissipate as they grow in size, the commitment to mission will, in fact, act as a restraint on their proclivity to simply want to go into a market and compete with commercial broadcasters.
>
> It’s not going to – the commitment to mission will continue to drive what their decision making is. Once again, as long as they, in fact, remain a non-commercial broadcaster, they are subject to the non-distribution constraint, so there’s no economic reward … as an organization gets larger to compete.
>
> And, finally, it’s also well recognized in this literature that so long as a nonprofit, indeed, has a strong commitment to mission, that it is going to actually have an aversion to competing with its commercial counterparts, because that simply means it’s going to have to devote scarce, time, energy and resources to competition rather than achieving its mission.

8/20/20 Tr. 3272:22-3273:24 (Cordes); Cordes CWDT ¶ 32. Professor Cordes confirmed that the aversion to competition persisted even if a large nonprofit were offered lower fees:

> Q. [D]o you have an opinion on whether offering lower fees to larger non-commercial broadcasters above a threshold would encourage those broadcasters to compete more actively with commercial webcasters?
>
> A. Again, there’s no necessary connection. So the first point is that charging lower fees is not going to enable the non-commercial broadcasters to “change the price of the good that it offers” because, in fact, the good is available free of charge.
>
> Secondly, while it certainly is true that lower fees would increase the financial resources of a non-commercial broadcaster, the operative question is what would it do with those additional financial resources.
>
> And here, once again, commitment to mission plays a very important role because if a deed is committed to mission, yes, it would welcome those additional resources but it would effectively plow them back into the maintenance and the

> enhancement of mission.
>
> It would not, for example, either desire or be able to take that extra cash, if you will, and use it to enhance the bottom line or increase shareholder value.

8/20/20 Tr. 3273:25-3274:25 (Cordes).

90. The allegation that noncommercial broadcasters will converge or compete with commercial entities once they reach a certain size – and should thereafter pay commercial rates for additional webcasting – isn't an economically rational conclusion. Cordes CWDT ¶¶ 25-26; Steinberg AWDT ¶ 24.

C. The Separate Commercial and Noncommercial Market Segments Regarding the Digital Sound Recording Performance Right Fosters Seller Side Price Discrimination Favoring Noncommercial Entities.

91. In order for a willing buyer/willing seller negotiation to be likely to result in a different price for a good or service than another such negotiation, only one party to that negotiation – the seller or buyer – needs to be willing to accept a different price:

> it's possible that it's not just willingness to buy that's different, but willingness to sell. <u>You only need one to be different</u>, but, if both are different, you would expect that the deal that would be reached between willing buyers and willing sellers would be different.

8/26/20 Tr. 4001:10-22 (Steinberg) (emphasis added). "[A]s long as there is different willingness to pay, there's a different market segment, and we would naturally expect different prices in each segment." *Id.* at 4002:19-24. Here, in addition to noncommercial broadcasters' lower willingness to buy the digital performance right in sound recordings, a form of seller price discrimination, where sellers "offer the same good or service at different prices to different groups of buyers," is likely as well. Cordes CWDT ¶ 21.

92. "Price discrimination based on willingness to pay differences across submarkets will <u>increase</u>, not <u>decrease</u> the fair market value of the digital performance right in sound recordings." Steinberg AWDT ¶ 45. As Professor Steinberg made clear:

> As long as different groups of customers respond differently to the price, a monopolist will find that it can capture more consumer surplus and increase its profit by charging them different prices.

Id. ¶ 45 n.19 (quoting Krugman and Wells, p. 401); 8/26/20 Tr. 4002:9-14 (Steinberg).

93. Conditions conducive to fostering seller price discrimination include:

> “(a) buyers need to have different price elasticities of demand (sensitivity to higher and lower prices);
>
> (b) sellers need to be able to identify which groups of buyers have higher and lower price elasticities of demand;
>
> (c) sellers need to have an incentive to differentiate between the price charged to buyers with lower price elasticities and the price charged to buyers with higher price elasticities; and
>
> (d) buyers benefiting from the lower prices must not be able to re-sell the good to other buyers.”

Cordes CWDT ¶ 22; 8/20/20 Tr. 3266:1-18 (Cordes). “If these conditions are met, then the seller will be able to increase profits by setting a higher price to buyers who are relatively insensitive to price, thereby enticing buyers who are relatively sensitive to price to buy the good or service at a lower price.” Cordes CWDT ¶ 22; 8/20/20 Tr. 3266:7-15 (Cordes). More specifically, “if noncommercial broadcasters were the relatively elastic buyers in the market for streaming, one could observe willing sellers offering a price for the right to stream sound recordings to noncommercial broadcasters that was lower than that offered to commercial webcast music services such as Pandora or to commercial broadcasters.” Cordes CWDT ¶ 23.

94. The market for digital sound recording performance licenses exhibits conditions conducive to seller price discrimination between for-profit and nonprofit webcasters. 8/20/20 Tr. 3266:19-3267:17 (Cordes). *First*, noncommercial webcasters have different price elasticities of demand than commercial webcasters. *Id.* at 3256:1-3, 3267:10-14.

95. *Second*, sound recording owners are easily able to identify noncommercial broadcasters and webcasters. *Id.* at 3267:4-9; 8/26/20 Tr. 4002:1-3 (Steinberg); *see also* 17

U.S.C. § 114(f)(4)(E) (defining "noncommercial webcaster" as, inter alia, an entity exempt from taxation under 26 U.S.C. § 501); 37 C.F.R. § 380.7 ("Noncommercial webcaster has the same meaning as in 17 U.S.C. 114(f)(5)(E) [now (4)(E)].").

96. *Third*, given the higher price elasticity of demand of noncommercial webcasters, sellers would be incentivized to price discriminate to maximize their profits. 8/20/20 Tr. 3267:10-14 (Cordes) (observing that "nonprofit broadcasters … would have a higher price elasticity of demand" and "would be more likely to buy the good when they otherwise might not, if, in fact, the price were lowered to them").

97. *Fourth*, noncommercial webcasters cannot resell their rights to commercial webcasters. 8/26/20 Tr. 4002:3-5 (Steinberg); 8/20/20 Tr. 3267:15-17 (Cordes); Steinberg AWDT ¶ 45 & n.19 (quoting Krugman and Wells, p. 401). Again, eligibility for noncommercial rates is governed by the regulations and cannot be transferred to commercial entities. 17 U.S.C. § 114(f)(4)(E) (defining "noncommercial webcaster"); 37 C.F.R. § 380.7 (defining "noncommercial webcaster" by reference to section 114). Thus, price discrimination is likely.

98. Moreover, "[e]ven if the webcasters play identical songs in an identical context, whether they are commercial or non-commercial, as long as there is different willingness to pay, there's a different market segment, and we would naturally expect different prices in each segment." 8/26/20 Tr. 4002:19-24, 4080:11-16 (Steinberg); Steinberg AWDT ¶ 44 ("Willing sellers often negotiate different prices with different willing buyers even when there is no product differentiation.").

99. "Price discrimination is even more common for differentiated products, and NCE webcasters are offering a different set of products to a different audience with different financial and regulatory constraints than commercial webcasters." *Id.*

100. The general marketplace confirms that "[f]or-profit firms are often willing to sell their products and services to nonprofit organizations at a substantial discount." *Id.* ¶ 40. "[F]or-profit organizations will donate to charity, they will give away products to charity, and they will offer products for lower prices to nonprofit organizations." 8/26/20 Tr. 4001:10-22 (Steinberg). He identified Google, Microsoft Office, Dropbox, LinkedIn, Sand Associates, and Todoist as companies that offer goods or services to nonprofits at no charge or significant discounts and testified that "the list goes on." Steinberg AWDT ¶ 40. Professor Cordes similarly testified that "seller price discrimination favoring nonprofits … in the general marketplace" is "fairly common," and he identified three non-exhaustive examples of companies that offer such discounts or donate goods or services outright: Google, LinkedIn, and Dell. Cordes CWDT ¶ 24; 8/20/20 Tr. 3268:19-3269:2 (Cordes). SoundExchange's witness, Professor Tucker, acknowledged that Slack offers some nonprofit entities "a free upgrade to its standard plan" and others a discount of fully 85%. 8/18/20 Tr. 2513:8-2514:6 (Tucker); TX 3067.

101. Significant nonprofit discounts – and even donations – are similarly offered to noncommercial broadcasters in particular. As Ms. Burkhiser testified, the lower willingness to pay of noncommercial broadcasters "frequently make for-profit sellers of such products more willing to give [Family Radio] price reductions on their products that they do not make available to commercial buyers of those products." Burkhiser WDT ¶ 45. These include: a donated grand piano (from Mason & Hamlyn); a significant price reduction on contracting work (from an Alameda, CA-based contractor); reduced membership fees (Iowa Broadcasters Association and Shenandoah Chamber and Industry Association); and significant discounts from Microsoft Office 365 and Tech Soup. *Id.* ¶¶ 59-61; 8/31/20 Tr. 4770:5-10 (Burkhiser).

102. Sellers of the specific statutory rights at issue here similarly have engaged in price discrimination favoring noncommercial webcasters. For example, SoundExchange, on

behalf of record company sellers, agreed to accept rates below otherwise-applicable commercial rates from both NPR-affiliated noncommercial radio stations and student-run noncommercial radio stations. *See* TX 3020, TX 3021 (NPR); *see* TX 3000 & TX 3019 (CBI).

D. Noncommercial Broadcasters' Distinctive Traits as Broadcasters Also Lower Their Willingness To Pay for License Rights Vis-à-Vis Online-Only Commercial Music Services.

103. Apart from noncommercial broadcasters' differentiating characteristics as nonprofit entities, they do share other traits with commercial radio broadcasters that render music less important to their operations and lower their willingness to pay for license rights vis-à-vis online-only commercial music services. All broadcasters, both commercial and noncommercial, differ from online-only statutory music services in that they are terrestrial radio stations that simulcast their terrestrial broadcast programming online. Steinberg AWDT ¶ 11 ("I understand that … virtually all of the webcasting conducted by NCE broadcasters consists of online simulcasting."); Burkhiser WDT ¶ 47 ("The programming that we stream over the Internet is the same as our broadcast programming …"). As such, their actual and intended online listeners overwhelmingly are their local, over-the-air listeners, whom they can reach without having to pay sound recording royalties. Emert WDT (*Web IV*) ¶ 28 ("The vast majority of our listeners are local, which is precisely who we aim to serve."); 8/31/20 Tr. 4758:7-4759:2 (Burkhiser) (testifying that Family Radio experienced an "incredible" and "immediate increase" in online listenership in Buffalo, NY shortly after sale of Buffalo broadcast station); Newberry WDT ¶ 18 ("[F]or all but the largest and most famous radio stations, the vast majority of simulcast listening happens within the station's market.").

104. Broadcasters' ability to reach most of their listeners without paying sound recording performance royalties exerts downward pressure on the rates that they are willing to pay for webcasting. 8/31/20 Tr. 4760:3-4761:19 (Burkhiser) (describing dilemma Family Radio

has faced from migration of listeners from broadcast signal, where no royalties were due, to online, where royalties were due, and measures taken to reduce online listenership); Wheeler WDT ¶¶ 23-29 (describing Mel Wheeler, Inc.'s reluctance to simulcast and its business decision "not to materially promote the simulcast" once it did begin to simulcast due to increased royalties); Newberry WDT ¶ 25 ("The costs associated with offering a stream, however, are large and for some broadcasters, too large to justify.").

105. Noncommercial broadcasters also "must comply with various FCC requirements that apply to all radio broadcasters." Burkhiser WDT ¶ 46. These include obligations to serve the public interest and the local communities in which they operate. *Id.*; 47 U.S.C. §§ 307(a), 309(a), (k); Leonard WDT ¶ 35; Newberry WDT ¶ 11. Broadcasters also "must maintain in [their] public file and update quarterly 'a list of programs that have provided the station's most significant treatment of community issues during the preceding three-month period.'" Burkhiser WDT ¶ 46 (quoting 47 C.F.R. § 73.3527(e)(8)); Wheeler WDT ¶ 8.

106. In addition, broadcasters also transmit significant non-music programming, including news, public affairs programs, prayer requests, talk and teaching programs on various practical living and religious topics, on-air hosts informing and providing encouragement to their listeners, children's programs, news, inspiring stories highlighting the goodness of everyday Americans. Burkhiser WDT ¶¶ 16, 62; 8/31/20 Tr. 4752:2-10 (Burkhiser).

107. Sound recordings therefore play a much less important programmatic role for broadcasters than they do for online-only music services. Leonard WDT ¶ 45 ("When non-music content is an important driver of a radio station's listenership, music is less important to the radio station than in the case of a custom radio service that offers only music content."); Pittman WDT ¶ 16 ("[W]hile music is certainly an important part of many broadcast radio stations, it plays a relatively less significant role in the success of iHeart's broadcast radio

stations and simulcast products as compared to custom radio and on-demand services that depend entirely on music.").

108. Noncommercial and commercial broadcasters also build and maintain strong ties to the communities and listeners they serve, which fosters listener loyalty to the broadcasters for reasons unrelated to music. These efforts include:

a. radio station staff attendance, and interaction with listeners, at community outreach events such as food drives and local fairs (Burkhiser WDT ¶¶ 62-63);

b. broadcasters' support of local charities (Newberry WDT ¶ 15; Gille WDT ¶ 13; Wheeler WDT ¶ 16);

c. on-air hosts' interaction with listeners by sharing their lives and how the Bible has supported them, reading devotionals, praying for their listeners, sharing prayer requests, providing relevant local news, weather, natural disaster, and traffic information (Burkhiser WDT ¶ 62; Gille WDT ¶¶ 12, 15; Pittman WDT ¶¶ 17-28; 9/9/20 Tr. 5986:17-25 (Pittman));

d. "keep[ing] its listeners informed of local and national issues of concern and interest every day through … news and public affairs programming," "which engages listeners in the genuine discussion of issues, interests and concerns of their local communities to bring hope towards identifying and solving local community problems" (Burkhiser WDT ¶¶ 16, 49); and

e. invitations for listeners to connect with the radio station through in-studio tours for local students and youth camps, listener-based prayer teams, and social media (*id.* ¶¶ 50, 62-63).

109. These robust efforts to foster community connections "stand in sharp contrast to the nature of listener relationships with music-only services, which do not even offer a human voice to walk listeners through the songs." *Id.* ¶ 62. As Ms. Burkhiser testified, "based on [her] observations, outreach does not appear to be as much of a focus among commercial music services such as Pandora." *Id.* ¶ 63. Indeed, a study providing [[[redacted]]] acknowledged that "[[[redacted]]]." TX 4001 at 3. That same study also provided consumer survey results that compared [[[redacted]]

[redacted]]]. *Id.* at 19. When those consumers were asked [[[redacted]]]." *Id.* By contrast, [[[redacted]]]. *Id.*

110. The National Association of Broadcasters ("NAB") has described certain unique broadcaster traits that reduce willingness to pay vis-à-vis Internet-only custom music services in further detail in Parts I. A and III.C of its Proposed Findings of Fact and Conclusions of Law ("NAB's PFFCL"), including the promotional value of radio, its lower interactivity, and the greater value of non-music content to broadcasters. Each of these traits applies equally to noncommercial simulcasters. For example, Family Radio simulcasts its programming and does not offer more interactive custom radio (Burkhiser WDT ¶ 24); "has been actively courted by many Christian artists, including independent artists, aspiring to be heard on [its] stations" (*id.* ¶ 15); and simulcasts significant talk and teaching content (*id.* ¶¶ 11-13). Thus, any rate distinctions favoring simulcasts equally apply to differentiate noncommercial simulcast programming from other forms of noncommercial programming, and the NRBNMLC incorporates by reference Parts I.A and III.C of NAB's PFFCL as if fully set forth herein.

IV. A BENCHMARKING APPROACH BEST REFLECTS THE RATES THAT NONCOMMERCIAL BUYERS WOULD NEGOTIATE WITH SELLERS.

111. For several reasons, the best way to set rates that reflect what noncommercial buyers would agree to in the marketplace with sellers is to consider the rates that willing sellers already have agreed to with other noncommercial broadcaster buyers. *First*, benchmarks reflect actual buy-in from both sides of the "willing buyer/willing seller" market equation in a concrete agreement – a principle that one of SoundExchange's economists, Mr. Orszag, has recognized:

> Benchmarking analysis is especially useful because it relies on actual marketplace data, which provides information generated from real-world negotiations between

> the parties, and thus may serve as a reliable basis for the rates that would have prevailed in the hypothetical negotiation."

Orszag WDT ¶ 44. The use of benchmarks thus removes the need to rely on the unilateral demands of only one side of the market.

112. *Second*, benchmarks remove the need to rely on theoretical models. As the CARP adjudicating *Web I* observed in connection with choosing a benchmark approach over a theoretical model:

> Preliminarily, we recognize that rate-setting based upon theoretical market projections is a difficult endeavor. This is true in part because it is virtually impossible for a theoretician to identify all of the factors that might influence the structure of a market and the manner in which these factors will interact to establish rates. The complexity of real world markets makes predicting market rates highly susceptible to error. Real world participants in an actual marketplace discover relevant market-influencing factors as they negotiate deals, and these factors are reflected in the ultimate agreements reached. Actual agreements contain embedded information that cannot be captured fully in the projections and estimates of theoretical analysts. Factors that the analyst suspects might influence hypothetical negotiations should be subsumed and reflected in actual negotiated agreements, but the theorist's capacity for perfect projection is subject to the inherent limits of human fallibility.
>
> Moreover, theoretical models are necessarily based upon a series of logical assumptions and analogies. Each assumption or analogy inevitably involves some degree of uncertainty or inexactitude. The cumulative impact of a string of such assumptions may produce a model which differs substantially from real world experience.

CARP Report at 38-39 (citations omitted); *accord id.* at 46 (rejecting use of a "theoretical model, which attempts to deduce a rate through a series of assumptions drawn from a marketplace far removed from the one envisioned in this statute"). "[B]ecause … it is extraordinarily difficult to predict marketplace results from purely theoretical premises, it is clearly safer to rely upon the outcomes of actual negotiations than upon academic predictions of rates those negotiations might produce." *Id.* at 43. "[A] benchmark is … always superior to a bunch of theorizing if one is available … ." 8/26/20 Tr. 4028:7-9 (Steinberg).

113. *Third*, the Copyright Act itself endorses the use of benchmark agreements with services comparable to those in the target market (here, noncommercial broadcasters):

> In determining such rates and terms, the Copyright Royalty Judges – … (ii) may consider the rates and terms for comparable types of audio transmission services and comparable circumstances under voluntary license agreements.

17 U.S.C. § 114(f)(1)(B).

114. "[V]oluntary noninteractive direct license agreements" in particular are a "category of benchmarks that Congress has explicitly identified as pertinent to the establishment of the statutory rate." *Order Denying in Part SoundExchange's Mot. for Rehearing and Granting in Part Requested Revisions to Certain Regulatory Provisions*, Docket No. 14-CRB-0001-WR, at 12 n.l5 (Feb. 10, 2016); *Mem. Op. on Novel Material Questions of Law in Web IV*, at 13 (Sept. 18, 2015) ("Direct agreements between sound recording owners and webcasters for uses covered by the section 112 and 114 licenses would appear to be [the very] type of evidence that … Congress had in mind."). The *Web I* CARP similarly found that the "most reliable benchmark rate" is one based on agreements with <u>statutory</u> (noninteractive) webcasting services:

> [T]he Section 114(f)(2) hypothetical marketplace is one where the buyers are DMCA-compliant services, the sellers are record companies, and the product being sold consists of blanket licenses for each record company's repertory of sound recordings. Accordingly, the most reliable benchmark rate would be established through license agreements negotiated between these same parties for the rights described.

CARP Report at 44. Even SoundExchange's predecessor – the Recording Industry Association of America ("RIAA") – asserted in *Web I* that benchmarks involving statutorily compliant webcasters "would serve as perfect benchmarks." *Id.* at 22; *see id*. at 38 ("RIAA argues that the best available evidence of the rate which willing buyers and willing sellers would agree to can be found in the 26 agreements it actually negotiated with licensees for the rights in question.").

115. *Fourth*, when a benchmark approach is used, no absolute promotion/substitution/ cannibalization adjustments are necessary, as these effects are baked into the benchmark rates:

> To the extent that the Judges adopt a rate based on benchmark evidence, it is not necessary to make additional adjustments to benchmarks to reflect the promotion and substitution factors. The Judges hold in this determination, as they have held consistently in the past, that the use of benchmarks "bakes-in" the contracting parties' expectations regarding the promotional and substitutional effects of the agreement. For the noninteractive benchmarks upon which the Judges rely, this longstanding position to deem substitution and promotion effects as incorporated into the agreements appears to be fully applicable.

Web IV, 81 Fed. Reg. at 26326; *accord Web II*, 72 Fed. Reg. at 24092 ("Because we adopt a benchmark approach to determining the rates, we agree with Webcaster I that such considerations "would have already been factored into the negotiated price" in the benchmark agreements."); *Web I*, 67 Fed. Reg. at 45244 ("[T]he effect of any promotional value attributable to a radio retransmission would already be reflected in the rates for these transmissions reached through arms-length negotiations in the marketplace."). The same is true for the provision requiring the Judges to consider the parties' relative contributions to the "copyrighted work[s] and the service." 17 U.S.C. § 114(f)(1)(B)(i)(II); *Web II*, 72 Fed. Reg. at 24095 ("We find that such [relative contribution] factors are implicitly accounted for in the rates that result from negotiations between the parties in the benchmark marketplace.").

116. Instead, "[t]he Judges have … repeatedly found that <u>relative</u> promotion, not <u>absolute</u> promotion/substitution, is the relevant factor in their consideration of statutory rates." *Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III): Final Rule and Order*, 83 Fed. Reg. 65210, 65214 (Dec. 19, 2018) ("*SDARS III*"). "[B]ecause only the relative difference between the benchmark market and the hypothetical target market would necessitate an adjustment, the absence of solid empirical evidence of such a difference obviates the need for such further adjustment." *Web II*, 72 Fed. Reg. at 24095.

117. *Fifth*, the Judges and CARP have relied on a benchmarking approach in setting webcasting rates in every proceeding since the creation of the statutory license. *See CARP Report* at 43 ("The Panel believes that the quest to derive rates which would have been negotiated in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements, if they involve comparable rights and comparable circumstances."); *Web I*, 67 Fed. Reg. 45240, 45252 (July 8, 2002) ("The Register accepts the Panel's determination that the Yahoo! agreement yields valuable information about the marketplace rate for transmissions of sound recordings over the Internet, and is a suitable benchmark for setting rates …."); *Web II*, 72 Fed. Reg. at 24091 ("[B]oth copyright owners and commercial services agree that the best approach to determining what rates would apply in such a hypothetical marketplace is to look to comparable marketplace agreements as 'benchmarks' indicative of the prices to which willing buyers and willing sellers in this marketplace would agree."); *Web III Remand*, 79 Fed. Reg. at 23110 ("The Judges, therefore, agree that it is appropriate to rely on benchmarks to establish rates in this section 114 proceeding."); *Web IV*, 81 Fed. Reg. at 26316, 26329, 26331 n.67 (adopting "the benchmark method of determining rates" in *Web IV* for commercial webcasters and "reject[ing] the non-benchmarking approaches to rate setting proposed by some parties").

118. In short, benchmark agreements that are comparable to the target market have an established record of providing excellent evidence of the rates that willing buyers and willing sellers would negotiate. "[T]here is a presumption that marketplace benchmarks demonstrate how parties to the underlying agreements commit real funds and resources, which serve as strong indicators of their understanding of the market." *Id.* at 26327.

V. THE SOUNDEXCHANGE-NPR LICENSE AGREEMENTS CONSTITUTE BY FAR THE BEST BENCHMARK FOR SETTING RATES FOR OTHER NONCOMMERCIAL BROADCASTERS

A. The Noncommercial NPR Benchmarks Are the Best Evidence for Setting Rates that Noncommercial Services Would Negotiate with Sellers and Constitute an Upper Bound on Those Rates.

1. The NPR Benchmarks Are Highly Comparable to Agreements That Noncommercial Buyers Would Negotiate with Sellers in the Target Market.

119. "A key component of a marketplace benchmark is that the market it purports to represent is comparable to the hypothetical target market in the proceeding. In determining whether a benchmark market is comparable, the Judges consider such factors as whether it has the same buyers and sellers as the target market and whether they are negotiating for the same rights." *SDARS III*, 83 Fed. Reg. at 65214 (citation omitted).

120. SoundExchange's predecessor in these proceedings – the RIAA – has acknowledged the importance of using comparable benchmarks. In *Web I*, it offered as benchmarks agreements that it asserted "'involve the <u>same buyer</u>, the <u>same seller</u>, the <u>same right</u>, the <u>same copyrighted works</u>, the <u>same time period</u> and the <u>same medium</u> as those in the marketplace that the CARP must replicate.'" *CARP Report* at 26 (citations omitted).

121. The NPR benchmarks are by far the most comparable agreements to the agreements that noncommercial buyers would negotiate with sellers in the target market in this case. Those benchmarks involve the:

(a) ***Same types of buyers*** – a large number of noncommercial broadcasters, including some with large usage, just like those at issue here (TX 3020 at 6 (defining covered "Originating Public Radio Station" as "a noncommercial terrestrial radio broadcast station" that meets certain requirements and "[q]ualifies as a 'noncommercial webcaster' under 17 U.S.C. 114(f)(4)(E)(i)" and "[o]ffers Website Performances only as part of the mission that entitles it to be exempt from taxation under section 501 of the Internal Revenue Code of 1986."); *id*. at 8 (observing that fee includes both "[a]n annual minimum fee" and "[a]dditional usage fees for certain Public Broadcasters"); TX 3021 at 8-9 (similar provisions));

(b) ***Same sellers*** – namely, record companies through SoundExchange, which represents all major record companies and independent labels (TX 3020 at 2; TX 3021 ("Copyright owners are represented [on SoundExchange's Board] by board members associated with the major record companies (five), independent record companies (two), the Recording Industry Association of America (one), and the American Association of Independent Music (one.)"); Ploeger WRT App. A ¶ 5);

(c) ***Same works*** – all of the sound recordings covered by the statutory license (TX 3020 at 7 (licensing "public performances by means of digital audio transmissions of sound recordings"); TX 3021 at 8-9 (similar provision));

(d) ***Same rights*** – the public performance by noninteractive webcasting and necessary ephemeral recordings (TX 3020 at 7 (licensing "public performances by means of digital audio transmissions of sound recordings … in accordance with all requirements of 17 U.S.C. 114" and "Ephemeral Recordings"); TX 3021 at 8-9 (similar provision)); and

(e) Even the ***same license term*** – 2021-2025 (TX 3020 at 7 (covering 2021-2025); TX 3021 at 8 (covering 2016-2020)).

2. The NPR Benchmark Approach Is Far Superior to Other Rate-Setting Alternatives.

122. Reliance on the NPR benchmarks to set noncommercial rates is far superior to using agreements with commercial webcasters to set all or any part of those rates. Commercial agreements, by definition, do not involve the same buyers. As Professor Steinberg testified:

> there are no appropriate benchmarks from the commercial submarket because … the non-commercial sector has a different willingness to pay. And so it would not indicate the difference and it's not obvious how we would correct a commercial benchmark in order to account for this difference."

8/26/20 Tr. 4028:10-16 (Steinberg); *see also supra* Part III.

123. As a prior CARP found, "a rate set for a commercial station is an inappropriate benchmark to use when setting a rate for the same right for noncommercial stations because of these economic differences between these businesses." *Web I*, 67 FR at 45258. "[U]se of a rate set for a commercial broadcaster would overstate the market value of the performance for a noncommercial station." *Id*.

124. The commercial agreements relied upon by SoundExchange in this proceeding – namely, on-demand agreements – do not even involve the same rights. The CARP in *Web I* rejected the use of such on-demand agreements. *See CARP Report* at 71 ("[T]he Panel rejects these agreements as useful benchmarks for the Section 114 rights at issue here. While the licensees in these agreements (digital music users) are similar to Section 114(f)(2) buyers, except for the [redacted] agreement previously discussed, the record company agreements cover different rights not subject to the Section 114(f)(2) statutory license. By contrast, the 26 RIAA agreements license the precise rights at issue here."). The Judges in later proceedings have acknowledged the need to, at a minimum, adjust such benchmarks because of their noncomparable nature. *See Web IV*, 81 Fed. Reg. at 26353 (limiting use of interactive benchmark to subscription services and only after interactivity and steering adjustments were made); *Web III Remand*, 79 Fed. Reg. at 23115 (finding that SoundExchange's proposed interactive benchmark requires "significant adjustments").

125. The NPR benchmarks also are superior to using theoretical models based on commercial licensees to set all or any part of those noncommercial rates, as those benchmarks enable the Judges to set noncommercial rates based on concrete, comparable noncommercial agreements instead of models attempting to measure marketplace behavior regarding commercial services. *See* 8/26/20 Tr. 4028:7-9 (Steinberg); *CARP Report* at 38-39, 43, 46; *supra* ¶ 112.

126. In a prior rate-setting proceeding, the Judges found that when a rate proposal is based on precisely such a voluntary settlement agreement between SoundExchange and a group of noncommercial webcasters covering statutory webcasting, that settlement agreement is "persuasive evidence" that the "proposal satisfies the willing buyer/willing seller standard." *Web III Remand*, 79 Fed. Reg. at 23123. Those same circumstances exist here with respect to the NPR benchmarks and the NRBNMLC's rate proposal, which is based on those benchmarks.

127. Use of the NPR agreements removes the need to rely on conclusory and one-sided conjecturing by only the seller side of the market – with no buy-in by willing buyers – about supposed risks of cannibalization or convergence, as such factors are already factored into the agreements themselves. *See Web IV*, 81 Fed. Reg. at 26326 ("The Judges hold in this determination, as they have held consistently in the past, that the use of benchmarks "bakes-in" the contracting parties' expectations regarding the promotional and substitutional effects of the agreement."); *supra* ¶¶ 115-116.

128. Nor may noncommercial on-demand agreements serve as a rate-setting benchmark. Even if it were possible to adjust for the noncomparable rights involved in on-demand agreements versus noninteractive agreements, there are "no voluntary agreements negotiated in unregulated markets that could serve as potential benchmarks specific to [noncommercial] services," as Mr. Orszag acknowledged. Orszag WDT ¶ 184. Neither Mr. Orszag nor any other SoundExchange economist identified any noncommercial benchmarks – or attempted to adjust commercial benchmarks to account for the many differences between these entities – to support SoundExchange's rate proposal for noncommercial services. Rather, Mr. Orszag relied exclusively on commercial agreements that he did not attempt to adjust to make them comparable to a noncommercial agreement. *See generally* Orszag WDT. Professor Willig – who did not rely on benchmarks at all but on models based on "the economics of bargaining theory" – explicitly stated that "[a]nalysis of [noncommercial] rates is beyond the scope of [his] assignment and testimony." Willig CWDT ¶ 9 & n.9; 8/10/20 Tr. 1086:2-4 (Willig). He did not "analyze[] data regarding non-commercial services in the analyses that [he] presented" and did "not offer[] any opinions about rates for non-commercial webcasting." *Id.* at 1085:17-1086:1.

129. Professor Tucker did "not proffer[] an independent [noncommercial] rate" at all, did not provide "an opinion on the appropriateness of any particular rates" for noncommercial

licensees, and did not "consider[] the rates that would result from a non-commercial willing buyer/willing seller negotiation in an effectively competitive market." 8/18/20 Tr. 2470:18-2471:12 (Tucker). She also admitted that she had "not seen any documents which are independent and contain a license agreement between a non-commercial broadcaster and SoundExchange, which … embody the current rates" and was "not aware of any agreements where non-commercial broadcasters paying the usage fee component have agreed to those rates in a negotiation." *Id.* at 2472:11-23.

130. The noncommercial statutory rates set in *Web IV* also "are not an appropriate benchmark. … [T]hose rates were proposed by SoundExchange and they were imposed, not proposed, on the buyers. So it doesn't reflect a willing buyer." 8/26/20 Tr. 4028:21-25 (Steinberg). Rather, those rates were based solely on SoundExchange's seller-side proposal. *Compare Web IV*, 81 Fed. Reg. at 26391 (describing SoundExchange's noncommercial proposal as a $500 fee for 159,140 monthly ATH plus per-performance fees set at commercial rates for additional performances) *with id*. at 26396 ("[T]he Judges adopt an annual rate of $500 per station or channel for all transmissions by noncommercial webcasters up to a threshold of 159,140 ATH. For transmissions in excess of 159,140 ATH, noncommercial webcasters shall pay royalties for 2016 at the commercial rate … ."). The commercial marginal rates that applied above the ATH threshold necessarily were based on commercial, rather than noncommercial, benchmark agreements. *See id.* at 26395 (acknowledging that "none of the licensees under any of the benchmark agreements [used by Professor Rubinfeld] were noncommercial webcasters").

3. The NPR Benchmarks Provide an Upper Bound to Rates Negotiated by Non-NPR Noncommercial Broadcasters Who Do Not Have the Benefit of Government Funding.

131. If anything, non-NPR noncommercial webcasters would negotiate rates that are lower than those supported by the NPR benchmarks given their lack of access to government

funding. 8/26/20 Tr. 4039:19-4040:5 (Steinberg) ("The lesson I draw is that it's reasonable to have a minimum fee of $500 and a one-third the commercial broadcaster rate for additional usage. It's reasonable, but it may be a little high; that is, higher rates than we would see … in a willing buyer/willing seller framework with the religious non-commercial stations because they don't have access to government money.").

132. Under the NPR Agreements, CPB – a private, nonprofit entity that has access to significant and stable government funding – directly pays all royalties due. TX 3020 at 2; *accord* TX 3021 at 2; TX 3065 at 263 (reflecting CPB's $560,000 royalty payment to SoundExchange in 2017 under the NPR Agreement). In 2017, it received over $500 million in government grants. *Id.* at 1, 9. That funding is subject to a two-year advance appropriation from Congress, which bolsters its stability by protecting it from political forces that may seek to reduce it. *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3111 ("2019 Continuing Appropriations Act"). The 2019 Continuing Appropriations Act authorized a payment of $445,000,000 to CPB for the fiscal year 2021. 2019 Continuing Appropriations Act, 132 Stat. at 3111; *see also* H.R. 7614, 116th Cong., at 1, 168 (2020) (House bill proposing to appropriate funds for FY 2021 but proposing to appropriate $515 million to CPB for FY 2023); *see generally* 47 U.S.C. § 396(k). Advance appropriation aims to "enable the Corporation and local stations to undertake advance program planning with assurance as to the level of Federal funding available" and "insulate the Corporation and public broadcasting from possible pressures that might naturally result from the annual budgeting and appropriation process." *See* H.R. Rep. No. 94-245, pt. 1, at 18 (1975).

133. Moreover, Congress has specifically mandated that a significant portion of CPB funding be allocated to cover precisely the royalties due under the NPR Agreements, which

furthers ensures the availability and stability of this funding to cover royalty payments. *See* 47 U.S.C. § 396(k)(3)(A)(i) (mandating that specified portion of CPB's annual budget "shall be available for … the payment of programming royalties and other fees").

134. NPR stations themselves also benefit from significant government grants. *See* TX 3020 at 2 ("CPB is the largest single source of funding for public radio … ."); TX 3065 at 34-459 (reflecting numerous large grants by CPB to radio stations and other entities); *accord* TX 3021 at 2; Steinberg AWDT ¶ 39 ("CPB support is substantial, with $69.31 million budgeted for direct grants to local public radio stations in FY 2018 …."); 8/26/20 Tr. 4029:5-10 (Steinberg).

135. By contrast, noncommercial broadcasters not affiliated with NPR are not eligible for such funding. *Id.* at 4029:1-10 ("There's one difference between NPR and the religious non-commercial webcasters. NPR qualifies for government money, and that government money is substantial … ."). CPB's significant, stable funding source, the coverage of NPR station fees by CPB – and, apart from that, the availability of significant station-specific additional funding not available to non-NPR noncommercial broadcasters – increases the willingness of NPR stations and CPB to pay higher royalties as compared with other noncommercial broadcasters:

> So a private organization is paying their royalties for them, and if you imagine what that does to their bargaining stance, they're probably willing to accept higher fees, higher rates for excess performances, than they would if they had to rely on their own resources to pay this.

Id. at 4029:11-16. "This suggests that under the willing buyer willing seller standard, other noncommercial webcasters would seek to pay lower rates than those agreed to in the NPR settlement, and the resulting negotiated fee would be lower." Steinberg AWDT ¶ 39. The NPR Agreement rate thus "is above an upper bound on reasonable rates." *Id.*; 8/26/20 Tr. 4029:18-21 (Steinberg) (concluding "that, if anything, the non-[commercial] religious webcasters would arrange a deal that was lower, that had lower excess usage rates than NPR").

B. The NPR Benchmarks Support a Flat Fee Structure or a Threshold Structure of $500 Plus a Per-Performance Rate Equal to One-Third of the Commercial Broadcaster Rate for Performances Above 159,140 Monthly ATH.

136. The 2021-2025 NPR Agreement charges a fixed annual fee of $800,000 to transmit increasing annual amounts of Music ATH, beginning with 360 million in 2021 and increasing 10 million per year to reach 400 million in 2025. TX 3020 at 7-8; Steinberg AWDT ¶ 33. The agreement covers NPR itself, American Public Media, Public Radio International, Public Radio Exchange, and up to 530 noncommercial radio stations and related websites. TX 3020 at 7. More stations can be added if they pay the minimum fee. *Id.* at 8.

137. One fee structure that the NPR Agreements support is the structure used in the agreement itself – a fixed annual fee for annual Music ATH blocks shared by a number of stations. *See* 8/26/20 Tr. 4040:22-4041:13 (Steinberg).

138. Another fee structure supported by the NPR Agreements is one incorporating the structure that the NPR Agreements themselves identify as underlying the flat annual fee. The 2021-2025 NPR Agreement states that the license fee consists of three elements of value from which the license fee was calculated:

> *Calculation of License Fee*. It is understood that the License Fee includes:
>
> (1) An annual minimum fee for each Public Broadcaster …;
>
> (2) Additional usage fees for certain Public Broadcasters; and
>
> (3) A discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

TX 3020 at 8; Steinberg CWRT ¶ 8.

139. Those same three components of value are stated in the current agreement (for 2016-2020), which explicitly identifies the minimum fee used in the calculation – $500:

> *Calculation of License Fee*. It is understood that the License Fee includes: (i) an annual minimum fee of $500 for each Covered Entity …; (ii) additional usage fees for certain Covered Entities; and (iii) a discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

TX 3021 at 9. That agreement includes the same flat fee structure found in the later agreement and charges $560,000 annually for 283,132,065 Music ATH used by the same 530 stations and other entities covered by the later agreement. *Id.* at 9-10; Steinberg CWRT ¶ 7.

140. The NPR Agreements can be expressed as a threshold structure using a SoundExchange spreadsheet (TX 3022) that SoundExchange characterized as "reflecting its analysis of potential value" of the current NPR agreement. TX 2057 at 22. TX 3022 shows that the current NPR Agreement's annual fee was derived based on a fee structure that includes:

(a) a $500 per-station annual minimum fee for a threshold of ATH; plus

(b) a per-performance fee for additional usage equal to 1/3 of the commercial broadcaster fee at the time.

Steinberg CWRT ¶¶ 3, 5-6; TX 3022 (relevant part attached as Appendix A hereto).

141. The first tab (labeled "[[[redacted]]]") estimates total royalties due from NPR stations under two structures: a [[[redacted]]] structure and a [[[redacted]]] structure consisting of a [[[redacted]]] minimum fee and [[[redacted]]]. *Id.*; Steinberg CWRT ¶ 4.

142. SoundExchange estimated fees under the [[[redacted]]] structure by using [[[redacted]]] and calculated estimated fees for [[[redacted]]] that [[[redacted]]]. TX 3022. Those estimates were between [[[redacted]]] the fee ultimately agreed to by the parties and thus [[[redacted]]] the $560,000 annual fee in the current agreement. *Compare id. with* TX 3021 at 10.

143. SoundExchange estimated fees under the [[[redacted]]] structure by using a [[[redacted]]]. TX 3022; Steinberg CWRT ¶ 5. It calculated estimated fees for [[[redacted]]], which [[[redacted]]] to the $560,000 fee in the current agreement. *Compare id.* ("Estimations line 48) *with* TX 3021 at 10; Steinberg CWRT ¶ 6.

144. SoundExchange estimated [[[redacted]]]. TX 3022 ("Estimations" lines 24-28, 47); Steinberg CWRT ¶ 6; 8/26/20 Tr. 4034:16-24 (Steinberg).

145. SoundExchange estimated [[[redacted]]] under the [[[redacted]]] structure by using [[[redacted]]] and calculating [[[redacted]]].[8] TX 3022 ("Estimations" lines 32, 40). It then converted [[[redacted]]]. *Id.* ("Estimations" lines 41-42). Next, it estimated [[[redacted]]] – rates that were [[[redacted]]] of the applicable commercial broadcaster per-performance rates of $0.0023 in 2014 and $0.0025 in 2015. *See id.* ("Estimations" lines 44-45); Steinberg CWRT ¶ 6;

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[8] [[[redacted]]]. TX 3022.

[9] [[[redacted]]]. TX 3022.

[10] [[[redacted]]]. TX 3022.

37 C.F.R. § 380.12(a) (2015). It then [[[redacted]]]. TX 3022 (“Estimations” line 46); Steinberg CWRT ¶ 6; 8/26/20 Tr. 4034:25-4035:13 (Steinberg).

146. SoundExchange then estimated [[[redacted]]]. TX 3022 (“Estimations” line 48); Steinberg CWRT ¶ 6; 8/26/20 Tr. 4035:14-19 (Steinberg). Those fees are [[[redacted]]] to the $560,000 annual fee that NPR/CPB agreed to pay for each year of the 2016-2020 term – the annual fee reflects only a [[[redacted]]] from 2015, and it remains constant over the entire five-year license term. *Compare* TX 3022 (“Estimations” line 48) *with* TX 3021 at 10; Steinberg CWRT ¶ 7. In other words, SoundExchange “accepted fees that were [[[redacted]]].” *Id.*

147. The calculations under the [[[redacted]]] structure explicitly account for two of the three license fee inputs stated under the 2016-2020 NPR Agreement: an annual per-station minimum fee of $500 and additional usage fees for certain stations. TX 3021 at 9. It is reasonable to infer that the third factor, administrative convenience, explains at least some of the reason that the 2016-2020 NPR Agreement did not include an annual fee greater than $560,000. That fee – especially when applied as a constant across a five-year term – likely [[[redacted]]] structure used in the valuation given the trend seen in these numbers. Professor Steinberg concludes that that difference would account for the administrative discount referred to in the agreement. Steinberg CWRT ¶ 9.

148. The 2021-2025 NPR agreement appears to be a simple update of the current NPR agreement, with both an increased annual fee ($560,000 to $800,000) and increased total Music ATH (285,132,065 to a range of 360 to 400 million). *Compare* TX 3020 at 7-8 *with* TX 3021 at 9-10. Expressed as an average fee per Music ATH for comparative purposes (and using an average Music ATH cap in the 2021-2025 agreement of 380 million), the two agreements have almost the identical value, consistent with a very low rate of inflation over the 5-year term:

a. 2016-2020 NPR Agreement: $0.0020/Music ATH ($560,000/285,132,065)

b. 2021-2025 NPR Agreement: $0.0021/Music ATH ($800,000/380,000,000).

The remarkably constant average prices reflected in the NPR Agreements indicates that the threshold structure underlying the 2016-2020 NPR Agreement – a $500 minimum fee and usage fees equal to one-third of the applicable commercial fee for that type of service – remains a reasonable estimate of the components of value for the 2021-2025 agreement. *See, e.g.*, Steinberg CWRT ¶ 10 ("[[[redacted]]]"); 8/26/20 Tr. 4044:6-12 (Steinberg) ("[I]t strongly appears because the calculation is so close, that when the parties negotiated their agreement for *Web IV*, the excess usage fee was one-third of the commercial rate prevalent at the time. And so the NPR agreements support a similar structure applied to the religious non-commercial stations.").

C. The NPR Agreements Do Not Present a Statutory Shadow Issue.

149. The NPR Agreement rates also do not suffer from any purported statutory shadow. As of 2018 (the most recent year for which full-year data was available), those average rates were not only about 90% lower on average than the corresponding commercial rates but about 65%-75% lower than the corresponding noncommercial rates set by the Judges on an average per Music ATH basis. *See* 8/13/20 Tr. 2047:20-2050:13 (Orszag) (agreeing that 2018

NPR average fees assuming twelve sound recordings per Music ATH are about 90% lower than the 2018 commercial rate); TX 3021 at 9-10 (NPR fee); *supra* Part II.D (non-NPR fees are about 283% to 413% higher than average NPR fees).

150. As the Judges found in *Web IV*, there is no statutory shadow issue where negotiated rates are less than the statutory rates set by the Judges:

> Additionally, the Judges' consideration of the Pandora/Merlin Agreement and the iHeart/Warner Agreement as appropriate benchmarks for the ad-supported (free-to-the-listener) market obviates the supposed "shadow" problem. In both benchmarks, the rate is below the otherwise applicable statutory rates. The statutory rates did not cast a shadow that negatively affected the licensors in those agreements because … they voluntarily agreed to rates below the applicable statutory rates …, rather than defaulting to the higher statutory rate.

Web IV, 81 Fed. Reg. at 26331; *see also id*. at 26329 ("[T]he Judges find that any such 'shadows' that could have been cast by existing statutory rates did not meaningfully affect the effective steered rates in the Pandora/Merlin Agreement or the IHeart/Warner Agreement. As discussed herein, those rates are below the otherwise applicable statutory rates, and it would be irrational for a licensor to accept a rate below the statutory rate when it could have rejected the direct deal and enjoyed the higher statutory rate."). The Register of Copyrights cited with approval the Judges' statutory shadow finding in this regard. *See Order Denying in Part SoundExchange's Mot. for Rehearing and Granting in Part Requested Revisions to Certain Regulatory Provisions*, Docket No. 14-CRB-0001-WR (2016-2020), at 12 (Feb. 10, 2016) (rejecting SoundExchange's statutory shadow argument because sellers would not have agreed to below-statutory rates "unless such rates were in their economic interests, i.e., their interests as willing sellers/licensors dealing with willing buyers/licensees")). Here, as in *Web IV*, there is no statutory shadow because SoundExchange agreed to below-statutory rates with NPR. *See* Part II.D.

VI. THE NRBNMLC'S RATE PROPOSAL

A. The NPR Benchmarks Support Two Alternative Rate Structures that Each Reflect the Rates and Terms that Willing Noncommercial Broadcasters Would Negotiate with Willing Sellers in the Market.

151. The NRBNMLC's rate proposal is based on the commonsense principle that – at a minimum – noncommercial religious broadcasters would not agree in a negotiation to pay disparately higher fees for comparable amounts of music use than the only other significant group of noncommercial broadcasters with large listenership – NPR broadcasters. Indeed, noncommercial religious broadcasters would pay less than NPR due to NPR's access to government funding, which covers station royalties in their entirety. *See supra* Part V.A.3; Steinberg AWDT ¶ 39; 8/26/20 Tr. 4039:23-4040:4 (Steinberg). Moreover, the NPR Agreement shows the price that willing record company sellers would charge noncommercial broadcasters.

152. Option 1 of the NRBNMLC's Rate Proposal mirrors the stated breakdown of the three stated elements of value factored into the NPR license fee. *Compare* The NRBNMLC's Amended Proposed Rates and Terms Ex. A at 14 (July 31, 2020) ("NRBNMLC Rate Proposal") *with* TX 3020 at 7-9 *and* TX 3021 at 9-10. Option 2 mirrors the stated NPR flat fee rate structure directly. *Compare* NRBNMLC Rate Proposal Ex. A at 11 *with* TX 3020 at 7-8.

153. Both structures are firmly grounded in the NPR benchmarks and thus are premised on agreements that reflect buy-in from <u>both</u> willing noncommercial buyers and willing sellers. Unlike SoundExchange's rate proposal, a structure based on a noncommercial benchmark provides evidence of rates that both noncommercial broadcasters and record company sellers would agree to and thus best reflects the rates that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing [noncommercial] buyer and a willing seller." 17 U.S.C. § 114(f)(1)(B); 8/26/20 Tr. 4039:19 – 4040:5 (Steinberg) ("[I]it's reasonable to have a minimum fee of $500 and a one-third the

commercial broadcaster rate for additional usage. It's reasonable, but it may be a little high; that is, higher rates than we would see in a -- in a willing buyer/willing seller framework with the religious non-commercial stations because they don't have access to government money."); Steinberg AWDT ¶ 34 ("If the Judges determine that a lump sum similar to the NPR agreement is a reasonable fee structure for certain NCE webcasters (such as religious broadcasters), the NPR agreement provides a useful starting point for rate setting.").

B. Option 1 of the NRBNMLC's Rate Proposal Replicates the Structure on Which the NPR Rate Was Explicitly Calculated.

154. The first alternative adopts the specific structure identified in the 2021-2025 NPR Agreement. *Compare* NRBNMLC Rate Proposal Ex. A at 11 *with* TX 3020 at 7-8 (2016-2020 NPR Agreement). That structure consists of the same annual minimum fee of $500 for the same initial threshold of ATH plus a usage fee above the threshold equal to one-third of the per-performance rate set for commercial broadcasters. *Compare* NRBNMLC Rate Proposal Ex. A at 9 *with* TX 3020 at 7-8 (2016-2020 NPR Agreement).

155. For several reasons, use of a one-third ratio in lieu of a specific per-performance number is reasonable. *First*, SoundExchange used the rates of $[[[redacted]]] and $[[[redacted]]] in the valuation with full knowledge of the commercial broadcaster per-performance rates of $0.0023 for 2014 and $0.0025 for 2015, which were first set in 2011, and those rates were specifically equal to [[[redacted]]] of the commercial rates. *Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order*, 76 Fed. Reg. 13026, 13051 (Mar. 9, 2011) (setting rates), *vacated and remanded*, 684 F.3d 1332 (D.C. Cir. 2012); *Web III Remand*, 79 Fed. Reg. at 23131 (reaffirming rates). That [[[redacted]]] was the [[[redacted]]] that had been set in *Web I* to differentiate noncommercial from commercial license fees at RIAA's own offer. *Web I*, 67 Fed. Reg. at 45259, 45272; 8/26/20 Tr. 4044:1-12

(Steinberg); Steinberg CWRT ¶¶ 5-6. Thus, the numbers used appeared to be driven more by the [[[redacted]]] ratio than the specific numbers.

156. *Second*, NAB has proposed a per-performance rate of $0.0008 for simulcasts by commercial broadcasters. NAB's Proposed Rates and Terms at 8 (Sept. 23, 2019). If NAB persuades the Judges to adopt its proposal, noncommercial broadcasters' above-threshold simulcast transmissions should be charged a lower rate than $0.0008 given that noncommercial broadcasters occupy a different market segment and have lower willingness to pay. 8/20/20 Tr. 3255:18-3256:3, 3267:10-14 (Cordes); 8/26/20 Tr. 3998:15-19 (Steinberg); Burkhiser WDT ¶ 45. This is particularly true given that the NPR Agreements represent the upper bound of rates that non-NPR broadcasters would negotiate with sellers given the substantial and stable government funding that pays for NPR royalties. Steinberg AWDT ¶ 39 ("NPR willingness to pay for royalty rights likely is significantly higher than that of non-NPR NCE webcasters."); 8/26/20 Tr. 4039:19-4040:5 (Steinberg) (observing that NPR rates are "reasonable" but "may be a little high … than we would see in a … in a willing buyer/willing seller framework with the religious non-commercial stations because they don't have access to government money"); 8/20/20 Tr. 3265:4-16 (Cordes); *accord* Cordes CWDT ¶ 17; *supra* Part V.A.3. It would make no economic sense to charge noncommercial broadcasters more for above-threshold performances than commercial broadcasters themselves are required to pay.

157. *Third*, in the last year for which full-year data is available in this case – 2018 – charging non-NPR above-threshold noncommercial broadcasters one-third of the commercial per-performance rate for above-threshold performances would bring their rates in line with those that NPR stations pay. That group of broadcasters had [[[redacted]]] channels and paid $[[[redacted]]] in usage fees for that year. TX 5068; Ploeger WRT App. E. At one-third of the $0.0018 per-performance rate ($0.0006), those broadcasters would have paid $[[[redacted]]]

in usage fees, bringing total fees to $[[[redacted]]].[11] As estimated in *supra* Part II.D, their total ATH at 12 sound recordings per ATH and assuming full use of the ATH threshold was [[[redacted]]].[12] Their per-ATH fee thus would have been $0.0020 (= $[[[redacted]]]). That is the same average per-Music ATH fee under the NPR Agreement for 2018 – $0.0020/Music ATH (= $560,000 / 285,132,065 ATH). TX 3021 at 9-10. The average fee equivalence between the two groups of broadcasters at a $0.0006 per-performance rate for 2018 shows not only that the one-third ratio is reasonable but also provides evidence of an upper-bound per-performance rate that is far less than the 2018 commercial rate and, in that year, would have brought non-NPR rates more in line with fees charged to NPR statons.

158. **Annualization**. The proposal annualizes the 159,140/month ATH threshold to account for seasonal listener peaks and valleys and to lower transaction costs for both parties by requiring tracking of a single annual threshold instead of 12 monthly ones. As Professor Steinberg testified:

> It is difficult for me to understand why NCE webcasters who cross the threshold in only a few months pose much of a threat to the value of digital broadcast rights. Brief flicks into supposed "overlap and convergence" evaluated on a monthly basis complicate NCE budgeting and lead to more frequent occurrence of the harmful side effect of restricting listenership, and there is no apparent benefit to offset these costs.

Steinberg AWDT ¶ 63; 8/26/20 Tr. 4040:6-21 (Steinberg) ("[B]y doing it on an annual basis, you have lower transactions costs for both parties, and I didn't see any real reason to – not to do it. I didn't see any real reason why we shouldn't save that money."); Cordes CWDT ¶ 37. Moreover, the Music ATH allotment in the NPR Agreements themselves is an annual – not monthly –

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[11] $[[[redacted]]]. TX 5068.

[12] [[[redacted]]] ATH = ([[[redacted]]]). TX 5068.

threshold, which further supports an annualized threshold here. TX 3020 at 7 (charging fee for "up to the total Music ATH … for the relevant calendar year" (emphasis added)); TX 3021 at 9.

C. Option 2 of the NRBNMLC's Rate Proposal Replicates the NPR's Stated Flat Fee Directly.

159. Option 2 of the NRBNMLC rate proposal adopt NPR's flat fee structure directly. That alternative consists of:

a. the same flat fee structure for an allotment of Music ATH shared by a group of noncommercial broadcasters; and

b. the same prepayment concept that requires the flat fee to be paid in advance by a single entity – the NRBNMLC – on behalf of those broadcasters.

NRBNMLC Rate Proposal Ex. A at 10-14.

160. The proposal also includes:

a. the same concept of covered stations, with the same option as NPR to add stations upon payment of additional minimum fee(s) (*id.* at 12);

b. the same definition of "Music ATH" to determine the type of ATH being paid for by the lump sum (*id.* at 10); and

c. the same average fee ratio between the license fee and Music ATH as that found in the NPR agreement (*id.* at 11).

In the NRBNMLC's proposal, the license fee and Music ATH are each 1.5 times higher than those same metrics in the 2021-2025 NPR Agreement – a fee of $1.2 million instead of $800,000 and Music ATH of 540 million to 600 million instead of 360 million to 400 million. *Compare id.* Ex. A at 11 *with* TX 3020 at 7-8. Given that the average per-Music ATH fee was remarkably constant in the 2021-2025 Agreement as compared with the 2016-2020 NPR Agreement despite both the license fee and Music ATH increasing substantially, a similar proportional adjustment, which results in an identical per-Music ATH fee as that found in the 2021-2025 NPR Agreement – is justified here. *See supra* Part V.B. Covered stations also increase in the NRBNMLC's proposal by a factor of 1.5, from 530 to 795. *Compare* NRBNMLC Rate Proposal Ex. A at 10 *with* TX 3020 at 7.

161. Consistent with the "administrative convenience" component of value found in the NPR benchmarks, Option 2 provides the same type of "administrative convenience" identified as a component of value in the NPR benchmarks by giving SoundExchange the same lump sum payments that cover multiple separate entities and the same "protection from bad debt that arises from being paid in advance." *Compare* NRBNMLC Rate Proposal Ex. A at 12-13 *with* TX 3020 at 8-9.

162. There is one additional component: To ensure that a rate is in place for all noncommercial webcasters, including those not represented by the NRBNMLC, the NRBNMLC proposes that those noncommercial licensees not covered by the flat fee pay:

a. the same $500 minimum fee for the same allotment of 159,140 ATH, although calculated annually; and

b. 1/3 of the commercial rate for the same type of service.

NRBNMLC Rate Proposal Ex. A at 9-10.

163. Either option reflects fees that willing noncommercial broadcasters have negotiated with sellers in the market and is superior to rates reflecting solely seller-side requests. *See* 17 U.S.C. § 114(f)(1)(B); 8/26/20 Tr. 4039:19-4040:5 (Steinberg); Steinberg AWDT ¶ 34.

VII. SOUNDEXCHANGE'S ATTEMPTS TO UNDERMINE THE NPR BENCHMARKS ARE MERITLESS.

164. SoundExchange's witnesses attempt to undermine the probative value of the NPR Agreements as benchmarks on a number of grounds. *See* 8/17/20 2230:12-223:15 (Tucker); 9/9/20 Tr. 5803:10-5804:6 (Ploeger). Each is without merit.

A. Alleged and Unfounded Differences in Music Intensity Do Not Undermine the NPR Benchmarks.

165. Professor Tucker attempts to differentiate the NPR Agreement on the basis of allegedly lower music intensity on noncommercial NPR stations than on noncommercial religious stations. 8/17/20 Tr. 2230:17-24 (Tucker). Professor Tucker made that claim despite admitting that she "did not attempt to quantify any differences in music intensity between NPR-affiliated stations and non-commercial religious stations," had "not had data on the NPR stations," and made her claim "not from data" but her anecdotal listening. *Id.* at 2476:14-2477:1. For several reasons, Professor Tucker's attempted differentiation is baseless.

166. *First*, many NPR stations are music intensive, so this is no basis for distinction. For example, at least [[[redacted]]] NPR stations covered by the current NPR Agreement as of Q2 2019 were identified as playing a classical music format, [[[redacted]]] played adult album alternative music, and [[[redacted]]] played jazz music. TX 3035. Professor Tucker herself acknowledged that she is "aware that there are NPR-affiliated radio stations that are music intensive." 8/18/20 Tr. 2475:1-5 (Tucker).

167. *Second*, the NPR Agreements only charge for Music ATH – that is, "ATH of Website Performances of sound recordings of musical works." TX 3020 at 6; *accord* TX 3021 at 7. Any talk ATH transmitted by NPR stations simply is not factored into the NPR Agreements' fees. As Professor Steinberg explained, "the agreement is for music ATH and not for overall ATH, so it's already correcting for any music intensivity difference." 8/26/20 Tr. 4024:19-21 (Steinberg).

168. *Third*, SoundExchange itself viewed the ATH of NPR stations factored into the NPR Agreements' fees as [[[redacted]]]. In documents that SoundExchange described as "reflecting its analysis of potential value" of the NPR rates and terms (TX 2057 at

22), it estimated that fully [[[redacted]]] sound recordings were transmitted in each Music ATH. TX 3022, 3041.

169. *Fourth*, NPR stations are not alone in transmitting significant amounts of talk programming. Rather, many religious stations transmit mixed format or talk programming, just like NPR stations. For example, Family Radio transmits mixed format programming that includes approximately 35% talk and teaching programming on weekdays and 25% of such non-music programming on weekends. Burkhiser WDT ¶ 11. Similarly, Joseph Emert, the President of Life Radio Ministries, Inc., testified in *Web IV* that the radio stations operated by his organization transmitted mixed format programming as well that included "significant amounts of" talk and teaching programming. Emert WDT (*Web IV*) ¶ 9. He also testified that the "key licensing issue" when the National Religious Broadcasters Music License Committee (which includes the noncommercial arm participating in Web V) was founded "was negotiating reasonable license terms for stations that broadcast programming including a mix of both music and talk content." *Id*. ¶ 16. Mr. Emert discusses the numerous talk programs hosted by NewLife FM and notes that "NewLife FM broadcasts many hours of Biblical talk and teaching programming – both local and national – during daytime hours, when people are far more likely to tune in." *Id*. ¶¶ 10-11, 20. And, while not exhaustive, additional noncommercial broadcasters reporting royalties to SoundExchange include [[[redacted]]]. TX 3039, 5068.

170. Moreover, the ATH definition applicable to non-NPR stations is not limited to the more narrowly defined "Music ATH" term in the NPR Agreements such that ATH not counted as "Music ATH" may nonetheless count toward non-NPR stations' threshold allotment.

Compare 37 C.F.R. § 380.7 ("Aggregate Tuning Hours") *with* TX 3020 at 6 ("Music ATH"). The NRBNMLC conservatively has not asked for the benefit of this narrower definition with respect to its annualized number for the 159,140/month ATH allotment. NRBNMLC Rate Proposal Ex. A at 7.

B. Alleged and Unfounded Differences in Musical Variety Do Not Undermine the NPR Benchmarks.

171. Professor Tucker also attempts to differentiate the NPR Agreement by claiming that "NPR plays a wide variety of music from many different genres, coming from many different artists; whereas a Christian radio station" allegedly focuses on "a more concentrated set of popular artists." 8/17/20 Tr. 2230:25-2231:16 (Tucker). For several reasons, that attempt is baseless.

172. As an initial matter, the musical genre transmitted by a particular service is irrelevant to the rates that those services pay under the webcasting Statutory Licenses: in the history of those Licenses, the rates have never differed based on musical genre. *See Web I*, 67 Fed. Reg. at 45273; *Web II*, 72 Fed. Reg. at 24111-12; *Web III Remand*, 79 Fed. Reg. 23128, 23131-32, 23135-36; *Web IV*, 81 Fed. Reg. at 26409. Nor does SoundExchange propose in this proceeding to charge more for particular genres of music versus others. Proposed Rates and Terms of SoundExchange, Inc. and Artist and Copyright Owner Participants at 2-3 (Sept. 23, 2019). SoundExchange's economist, Catherine Tucker, "didn't do any measurement of the value of different genres of music." 8/18/20 Tr. 2474:16-21 (Tucker). Mr. Orszag did not present any such analysis in his testimony either. *See generally* Orszag WDT; Orszag WRT. As SoundExchange's Director of License Management, Travis Ploeger, acknowledged, "there should not be a distinction" in "the amount that should be charged for the royalty amount" for "certain formats of music" over others. "Music is music." 9/9/20 Tr.5839:3-11 (Ploeger).

173. Moreover, noncommercial religious broadcasters play a wide variety of music formats. As Ms. Burkhiser testified, Christian music includes many different genres, including, among other, "urban gospel, southern gospel, worship, country, children, Spanish," as well as the hymn-based format that Family Radio airs. 8/31/20 Tr. 4752:13-17 (Burkhiser). She further testified that NRBNMLC Board members in particular transmitted "[l]ots of different genres" of Christian music, including, among others, "urban gospel, worship," "hymns and inspirational," "Hispanic/Spanish," "Christian AC," and "worship." *Id*. at 4762:13-21. Similarly, Mr. Orszag acknowledged that "[a]bsolutely" "there are a lot of different formats encompassed within the category" of Christian music, including "everything from gospel, to you know, contemporary, et cetera," as well as "southern gospel" and "Urban Christian" – "[a]ll different types." 8/13/20 Tr. 1971:14-1972:6 (Orszag).

174. The noncommercial services paying above-threshold usage fees do not transmit religious music exclusively. Rather, one of the top ten usage-fee-paying noncommercial broadcasters in 2018 even transmits [[[redacted]]] music, which is one of the key formats transmitted by NPR stations. Ploeger WRT ¶ 46 n.38 & App. E. As Mr. Ploeger acknowledges, "many [noncommercial webcasters] do not offer religious programming" and "represent a diverse set of music programming," including "bluegrass and jazz" as well as "electronic music." *Id.* ¶ 44; 9/9/20 Tr. 5797:20-5798:9 (Ploeger). These non-NPR webcasters transmitting other genres of music also would be required to pay commercial rates if their webcasting exceeds the threshold during the current term. *See* 37 C.F.R. § 380.10(a)(2).

175. Further, despite Professor Tucker's claim regarding the alleged variety of music played on NPR stations, the music-intensive NPR stations focus quite heavily on three specific formats: adult album alternative ("AAA"), classical, and jazz. TX 3035 (identifying Q2 2019 NPR covered stations and formats). In the Q2 2019 list of stations covered by the NPR

agreement, for example, fully [[[redacted]]] stations transmitted one or more channels in the AAA format, [[[redacted]]] stations transmitted one or more channels in a classical music format, and [[[redacted]]] stations transmitted channels in a jazz format. *Id.* Mr. Ploeger expressly confirmed that AAA, classical, and jazz "are all genres of music played on NPR stations." 9/9/20 Tr. 5841:16-19 (Ploeger). He was not, however, able to identify any other genres of music played by NPR-affiliated stations:

> Q. Do you recall when Ms. Ablin asked you about various genres of music that are played on NPR stations?
>
> A. Yes, I do.
>
> Q. Now, do you have an understanding of whether NPR stations play any other genres of music besides the – the several that she mentioned?
>
> A. I – I – I don't – I couldn't give you a definitive list of all the different kinds of music that NPR plays.

Id. at 5888:12-21.

C. Alleged Differences in Reporting Requirements Do Not Undermine the NPR Benchmarks.

176. SoundExchange witnesses have attempted to distinguish the NPR benchmarks because NPR apparently has agreed to provide SoundExchange with some form of consolidated reporting. *Id.* at 5803:13-5804:2; 8/17/20 Tr. 2232:12- 2233:15 (Tucker). Such consolidated reporting, however, was not important enough to the parties to the NPR benchmarks for them to identify such reporting in the benchmarks themselves as a stated component of value. 8/26/20 Tr. 4080:25-4081:2 (Steinberg). Instead, those license fee inputs were limited to (a) a minimum fee; (b) excess usage fees; and (c) a "discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance." TX 3020 at 8; *accord* TX 3021 at 9 (2016-2020 NPR Agreement). While the third stated component

specifically relates to administrative cost savings – and consolidated reporting relates to administrative costs – the only two forms of administrative discount identified in either NPR Agreement as an input to the license fee were (1) receiving an advance lump sum payment covering multiple stations; and (2) "the protection from bad debt that arises from being paid in advance." TX 3020 at 8; *accord* TX 3021 at 9. Consolidated reporting simply is not mentioned in these elements.

177. The NPR Agreements also do not quantify the value of consolidated reporting, and Mr. Ploeger, when asked, was not able to do so either:

> Q: Are you able, sitting here today, to quantify the benefit that SoundExchange would receive from getting consolidated reporting by non-commercial religious broadcasters?
>
> A. I can't put a specific dollar amount on it.

9/9/20 Tr. 5884:5-9 (Ploeger). Mr. Ploeger was not even sure at the hearing whether reporting terms with NPR had been agreed to when the NPR agreement was submitted to the Judges. *Id*. at 5824:13-16. He further admitted that "[c]onsolidating lots of logs, that will bring its own errors with it as well." *Id*. at 5885:18-19. Given the lack of quantification of the value of such reporting and the injection of at least some additional processing costs from errors arising from consolidated reporting, there is no basis for adjusting the NPR benchmarks based on this factor. *See Web IV*, 81 Fed. Reg. at 26386 (refusing to adjust benchmark for alleged, but unquantified, value of particular provision).

178. Moreover, the NRBNMLC's rate proposal includes the same consolidated reporting provision that NPR/CPB and SoundExchange themselves included in the submission of their agreement to the Judges. *Compare* TX 3020 at 9 ("Reporting. CPB and Public Broadcasters shall submit reports of use and other information concerning Website Performances as agreed upon with the Collective.") *with* NRBNMLC Rate Proposal Ex. A at 14 (July 31,

2020) ("Reporting. The NRBNMLC and Noncommercial Religious Broadcasters shall submit reports of use and other information concerning website Performances as agreed upon with the Collective."). As the NRBNMLC's rate proposal indicates, the NRBNMLC is willing to confer with SoundExchange in good faith regarding reporting terms, including terms providing for consolidated reporting.

179. In any event, noncommercial webcasting already is quite consolidated. If the top five webcasters as of 2018 provided consolidated reporting, it would account for over [[[redacted]]]% of all royalty payments.[13] Ploeger WRT App. A ¶ 33 & App. E.

180. While Mr. Ploeger asserted that the number of licensees included in consolidated reporting provides a benefit, it is unclear how much savings is even conferred given that (a) reports of use "are mostly delivered through Licensee Direct," electronically; and (b) SoundExchange uses a "next generation information technology platform" called "Next Gen," to process reports of use in the first instance. *Id.* App. A ¶ 10.

181. Moreover, in 2018, 883 of the 903 noncommercial licensees stream at or below 159,140 monthly ATH. Ploeger WRT ¶ 46 & App. A ¶ 33. [[[redacted]]] stations or channels operated by those entities stream at or below 80,000 monthly ATH. TX 3038. SoundExchange already has expressed willingness to waive reporting altogether for noncommercial college webcasters at this level of listenership in exchange for payment of a $100 proxy fee. TX 3019 at 9-10; TX 3000 at 5-6. Mr. Ploeger acknowledged that SoundExchange would realize a cost savings if it simply waived reporting requirements altogether for noncommercial webcasters streaming at this modest level of listenership. 9/9/20 Tr. 5855:24-5856:9 (Ploeger).

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[13] [[[redacted]]]. Ploeger WRT App. A ¶ 33 & App. E.

D. Alleged Differences Between Stated and Effective Rates Do Not Undermine the NPR Benchmarks.

182. SoundExchange's attempt to point to alleged differences between the NPR Agreement's license metrics and effective rates are both unfounded and, in the case of station count, irrelevant. SoundExchange's counsel first suggested that the effective per-Music ATH rate under the NPR Agreement would be higher if NPR stations' consumption did not reach the cap. 8/26/2020 Tr. 4069:5-4070:6 (Steinberg cross). While that is true as an arithmetic proposition, the evidence shows that those broadcasters likely [[[redacted]]]. TX 3041 Web V tab line 34. In a SoundExchange document valuing the current NPR agreement, SoundExchange specifically observed that "[[[redacted]]]." *Id.* (emphasis added). It estimated NPR's Music ATH use in 2018 at [[[redacted]]] – [[[redacted]]] the cap for that year. *Id.*; 8/26/20 Tr. 4078:6-24 (Steinberg). Under SoundExchange's counsel's own argument, exceeding the cap would make the NPR effective rate even <u>lower</u> than the stated numbers – and even more disparately low as compared with non-NPR broadcasters – particularly given that there is no provision in the Agreement requiring additional payments for exceeding the cap (although there <u>is</u> such a provision if the station cap is exceeded). TX 3021 at 9; TX 3020 at 7-8. Moreover, SoundExchange pointed to no evidence whatsoever that any such additional payments occurred.

183. Further, it is also true that the effective rates for non-NPR noncommercial webcasters who do not exceed the monthly ATH threshold on one or more channels would be higher if based on actual ATH consumption. Unlike NPR stations, there <u>is</u> record evidence that even the twenty noncommercial broadcasters paying usage fees do <u>not</u> exceed the ATH threshold on most channels. TX 5068. Rather, SoundExchange's own reporting data shows that these

broadcasters exceeded the threshold in only [[[redacted]]] of the [[[redacted]]] channel-months – [[[redacted]]]% – reported by these broadcasters for their [[[redacted]]] channels. *Id.*; Ploeger WRT App. E. Based on this contrast, an "effective rate" analysis may actual widen – not narrow – the sharp fee disparity between these groups.

184. SoundExchange's counsel also pointed to what he suggested was a disparity between the [[[redacted]]] number of stations covered by the NPR Agreement, but that argument is meritless for multiple reasons. 8/26/20 Tr. 4073:10-4076:18 (Steinberg). To begin with, SoundExchange's counsel wrongly represented that the number [[[redacted]]] as opposed to the 530-station limit. *Id.* at 4073:10-4074:12; TX 3022. In fact, the number that counsel referred to explicitly was described as "[[[redacted]]]." *Id.* ("Estimations" lines 13, 26) (emphasis added). Moreover, the "Sheet 1" tab of that same valuation document reports [[[redacted]]] – in other words, the station count [[[redacted]]]. *Id.* ("Sheet 1" line 30). By contrast, the line that SoundExchange's counsel used in Professor Steinberg's cross reported only [[[redacted]]], which shows that this line of cross misleadingly compared apples with oranges. *Id.* ("Estimations" line 13). As Professor Steinberg testified, the 2014 station count of [[[redacted]]] (8/26/20 Tr. 4076:14-18 (Steinberg)), and it was almost [[[redacted]]] (TX 3022 ("Estimations" line 26 & "Sheet 2" line 10)). In any event, a variation in station count does not alter the average price per

Music ATH of the NPR Agreements, which charge a specified fee for a specified block of Music ATH. *Compare* TX 3020 at 7-8 *with* TX 3021 at 9-10.

E. The Alleged and Unfounded Involvement of the Government In Negotiating the NPR Agreements Does Not Undermine The NPR Benchmarks.

185. Professor Tucker attempted to distinguish the NPR benchmarks by suggesting that the government was involved in negotiating the NPR benchmarks and claiming that "doing well in a negotiation with the government is very, very hard." 8/17/20 Tr. 2231:17-2232:11 (Tucker). As she acknowledged, however, NPR, CPB, and stations affiliated with NPR all are independent "private nonprofit organizations" that are not "owned or operated by the federal government." *Id.* at 2516:5-2517:12; *see also* 8/26/20 Tr. 4026:13-16 (Steinberg) ("The Corporation for Public Broadcasting is a private nonprofit registered under Section 501(c)(3) of the U.S. Tax Code."). She also acknowledged that "the federal government itself did not negotiate the agreement between NPR and SoundExchange." 8/17/20 Tr. 2517:13-19 (Tucker). As Professor Steinberg more pointedly observed, the "government had nothing to do with" the negotiation of the NPR Agreements. 8/26/20 Tr. 4026:8-16 (Steinberg) ("The government is not a party to the negotiation or to the contract that was negotiated."). To the contrary, an attorney in private practice (who represents a party in this case) negotiated the NPR agreement. TX 3046.

VIII. THE CURRENT NONCOMMERCIAL RATES DO NOT REFLECT RATES THAT WOULD BE NEGOTIATED BY WILLING NONCOMMERCIAL BUYERS AND WILLING SELLERS.

A. The Current Structure Does Not Reflect Any Noncommercial Willing Buyer Buy-In but Is Solely a Seller-Side Construct.

186. In contrast to the NPR benchmarks, the current rate structure, which charges noncommercial licensees commercial rates once they exceed a 159,140 monthly ATH threshold, does not reflect rates that noncommercial "willing buyers" paying those rates would agree to. 8/20/20 Tr. 3257:25-3258:7 (Cordes) ("My opinion, based on my applying the economic analysis

of nonprofits is that these are not rates that would be willingly negotiated in a hypothetical, competitive market between nonprofit or webcasters and sellers."); *id.* at 3256:11-23 ("[B]ecause of these distinctive traits that I will elaborate on in a minute, we would expect that non-commercial broadcasters would – would not agree in a voluntary negotiation to the current rate structure."). It was not proposed by a single noncommercial licensee and does not appear in any noncommercial benchmark in the *Web IV* record. *Web IV*, 81 Fed. Reg. at 26395.

187. Rather, the current structure was adopted wholesale from SoundExchange's seller-side noncommercial rate proposal. *Compare id*. at 26391 (SoundExchange's proposal) *with id*. at 26396 (structure adopted by Judges). As Professor Steinberg testified, "[T]he Web IV statutory rates are not an appropriate benchmark. As you know, those rates were proposed by SoundExchange and they were imposed, not proposed, on the buyers. So it doesn't reflect a willing buyer." 8/26/20 Tr. 4028:21-25 (Steinberg).

B. Noncommercial Broadcasters Would Not Negotiate – but Rather Would Take Measures To Avoid – Commercial Fees Above a Threshold.

1. The NRBNMLC's Witness from Family Radio Confirms that Commercial Fees Above a Threshold Is Not a Structure that Noncommercial Willing Buyers Would Negotiate.

188. A structure of commercial usage rates above a threshold is not one that Family Radio would negotiate. Rather, "Family Radio, as a large noncommercial broadcaster, certainly would seek rates lower than those applicable to commercial webcasters such as Pandora or iHeart Radio in negotiations with record labels." Burkhiser WDT ¶ 41. Ms. Burkhiser testified:

> We are very unlike commercial broadcasters and webcasters. We cannot increase income through advertising related to audience growth. And there's many other differences that make us different than commercial webcasters and broadcasters. So certainly if we were negotiating with a record company, we would not seek a structure charging usage fees equal to commercial rates indeed.

8/31/20 Tr. 4760:24-4761:6 (Burkhiser); Burkhiser WDT ¶ 37 ("Family Radio … is not able to increase its advertising revenues in proportion to audience growth to help manage the additional costs in the way that a commercial radio broadcaster would be able to do.").

189. Many other structural and operational differences make noncommercial broadcasters like Family Radio different from commercial broadcasters and webcasters and unwilling to pay commercial rates above a threshold. *Id.* ¶ 42 ("The differences between a nonprofit radio ministry such as Family Radio and commercial enterprises such as Pandora or iHeart Radio are numerous and stark."); *id*. ¶¶ 43-65; *supra* Part III.

a. Family Radio Was Required To Pay Tens of Thousands of Dollars in Additional Fees After a Doubled Per-Performance Rate Was Imposed on It.

190. Until 2016, Family Radio had always paid rates under the WSA Agreement rates reached with SoundExchange. Burkhiser WDT ¶ 27. In 2016, "for the first time in nearly 20 years, above the threshold [its] rates went up to full commercial per-performance rates. And so [its] usage rates more than doubled between 2015 and 2016. And if the commercial rates hadn't decreased after Web IV, [its] rates would have tripled over the threshold." 8/31/20 Tr. 4757:19 - 4758:6 (Burkhiser); Burkhiser WDT ¶¶ 27-28.

191. The effect of the usage fee doubling has been compounded for Family Radio due to a shift of some of its listeners from broadcast to online. Because Family Radio's donations have not covered its expenses in recent years, it has had to sell 50 of its stations since 2015, which left many of its listeners with the sole option of accessing Family Radio's ministry-oriented programming online. *Id.* ¶ 34; 8/31/20 Tr. 4758:7-22 (Burkhiser). In that same timeframe, Family Radio's online listenership increased 74%. *Id.* at 4758:16-22. This shift of listeners from broadcast to online has caused Family Radio to incur license fees to continue to

reach these listeners that it did not previously owe when those listeners tuned in over the air. Burkhiser WDT ¶ 35.

192. Family Radio's growing online listenership – compounded by the sharp rate increase – have caused its license fees to rise from $1,300 in 2015 to over $60,000 in 2019. *Id.* ¶ 30; 8/31/20 Tr. 4759:3-8 (Burkhiser). About one-half of that amount – $30,000 – is directly attributable to the webcasting fee increase. *Id*. at 4759:8-9. In 2020, Family Radio has been paying $9,000 to $10,000 per month. *Id*. at 4759:10-11.

b. Following the Imposition of Doubled Fees, Family Radio Took Measures To Reduce Its Commercial Per-Performance Fees.

193. The imposition of commercial per-performance fees on noncommercial broadcasters above the ATH threshold has caused Family Radio to alter its marketplace behavior specifically to reduce its above-threshold fee payment obligations, but in ways that sometimes impede its mission. For example, it has reduced its listeners' continuous streaming time by one-third before automatically terminating those sessions. Burkhiser WDT ¶ 38; 8/31/20 Tr. 4761:7-12 (Burkhiser). It also is planning to implement another channel consisting of choral music plus "traditional program offerings" and other "biblical content" "to lower [its] usage fees, try to divert them from [its] streams that are going above the threshold, and somehow reduce the costs by reducing excess performances above that threshold." *Id.* at 4761:7-17; Burkhiser WDT ¶ 39.

194. In addition, Family Radio took the "business step[] to seek to reduce its usage fees" of joining the National Religious Broadcasters in 2017, following the 2016 sharp fee increase. 8/31/20 Tr. 4761:20-4762:7 (Burkhiser); Burkhiser WDT ¶ 21. It did so "not only to join a community of Christian broadcasters and to explore potential partnerships for talk and teaching programs to offer on its stations but also specifically to learn more about reasons behind a sharp increase in the Family Radio's music licensing costs for digital streaming of sound recordings between 2015 and 2016." *Id.*

Ms. Burkhiser even serves on the NRBNMLC's Board, which includes each and every one of the top five noncommercial licensees that paid the most to SoundExchange in above-threshold fees in 2018 – totaling over [[[redacted]]]% of all such fees – and which has decided to divert mission-focused resources to oppose the imposition of commercial above-threshold fees in this proceeding. *Id.* ¶ 22; 8/31/20 Tr. 4762:8-12 (Burkhiser); Ploeger WRT App. A ¶ 33 ($2,471,712 in noncommercial fees); *id.* App. E (reflecting $[[[redacted]]] in noncommercial fees by these top five broadcasters). *Compare id. and* 9/9/20 Tr. 5800:8-20 (Ploeger) (identifying [[[redacted]]] as top five above-threshold fee payors) *with* TX 5316 (identifying same entities as serving on NRBMLC Board).

195. If the commercial per-performance fees do not decrease, Family Radio will consider further measures to reduce those fees to mitigate additional financial burden imposed on it since 2016. Burkhiser WDT ¶ 38. As Ms. Burkhiser testified:

> [T]he jump in the usage rates has really, really – it has been killing us. And it also really incentivizes us to try to suppress our listeners, which is completely anathema to our mission. We've taken many measures but we're – we may have to take more measures, if the fee doesn't decrease.

8/31/20 Tr. 4772:24-4773:8 (Burkhiser); Burkhiser WDT ¶¶ 38, 40. "[R]ates for 2021-2025 … will be critical to Family Radio's future ability to best serve the most listeners possible. *Id*. ¶ 40.

2. The Mere Fact that a Handful of Noncommercial Webcasters Have Paid Above-Threshold Per-Performance Rates Does Not Make Them Willing Buyers.

196. SoundExchange has suggested that the mere fact that a few noncommercial licensees have, in fact, paid these rates makes them "willing buyers," but that cannot be what the willing buyer/willing seller standard means; otherwise, there would be no need to conduct rate-setting proceedings to determine rates that willing buyers and willing sellers would negotiate under conditions of effective competition. *See* 8/18/20 Tr. 2634:21-2635:25 (Shapiro); 8/26/20

Tr. 4061:25-4062:4 (Steinberg) (mere fact that licensee paid rates imposed on it is "not what I understand willing buyer to mean"). Under that view, even monopolists (and complementary oligopolists) would have "willing buyers," in the sense that some buyers pay the monopoly price; a monopolist would not profit maximize if it priced to exclude all buyers. But the Judges are not tasked with setting a monopoly price, and the fact that some buyers will pay a monopoly price does not mean that such a price satisfies the willing buyer/willing seller standard. As Professor Steinberg testified, the largest noncommercial broadcaster, [[[redacted]]], "didn't propose" and "didn't ever agree to" the current structure and "would be willing to buy more at a different price." "[W]e have no evidence that this is a price that they would negotiate and accept in a willing buyer/willing seller framework." *Id.* at 4061:20-4062:11.

C. The Current Structure Discriminates Against Non-NPR Noncommercial Services, Including Broadcasters Transmitting Genres of Music Identical to Those Transmitted by NPR Radio Broadcasters.

197. As compared with the rates charged to noncommercial broadcasters affiliated with NPR, which was able to reach an agreement that reflected buy-in from both sellers and noncommercial buyers, the current noncommercial rate structure discriminates against non-NPR noncommercial services. While noncommercial religious broadcasters have borne the brunt of the fee disparity (*supra* ¶¶ 31-38), the disparity is not limited to noncommercial religious broadcasters. As Mr. Ploeger acknowledged, noncommercial licensees "are much more diverse than" religious broadcasters, and "many do not offer religious programming" at all. Ploeger WRT ¶ 44. Those licensees also are currently required to pay the disparately high commercial rates if they exceed the ATH threshold. 37 C.F.R. § 380.10(a)(2).

198. Many of these noncommercial services transmit the very genres of music that are prevalent on NPR stations: classical, jazz, and adult album alternative ("AAA"). TX 3035 (listing numerous music-intensive stations covered by the NPR Agreement that are identified as

classical, jazz, and AAA music stations); 9/9/20 Tr. 5842:14-17 (Ploeger) ("Q. Adult alternative, classical, and jazz music are all genres of music played on NPR stations, aren't they? A. They – they are, yes. I believe they are."). For example, based on their names alone, at least [[[redacted]]] channels transmit jazz music, [[[redacted]]] channels transmit classical music, and [[[redacted]]] channels transmit AAA/alternative music. TX 3038.[14]

199. Some of these stations already have paid above-threshold fees set at commercial rates, including one that numbered among the top ten usage-fee-paying noncommercial licensees in 2018 – [[[redacted]]]. Ploeger WRT App. E. Like many music-intensive noncommercial broadcasters covered by the NPR Agreement, [[[redacted]]] transmits classical music. *Compare* Ploeger WRT ¶ 46 n.38 *with* TX 3035 (identifying numerous music-intensive classical stations covered by the NPR Agreement in Q2 2019, including [[[redacted]]], to name a few). [[[redacted]]] alone, however, paid $[[[redacted]]] in license fees in 2018, which is [[[redacted]]] of the overall 2018 fees due under the NPR Agreement to cover fully <u>530</u> stations as well as NPR itself, American Public Media, Public Radio International, and Public Radio Exchange. *Compare* Ploeger WRT App. E *with* TX 3021 at 9-10.

200. A noncommercial licensee playing jazz music – another popular genre found on NPR – similarly reported excess performances and related commercial fees during the current license term. TX 3038 ([[[redacted]]]). Other noncommercial

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[14] At least [[[redacted]]] transmit jazz music. At least [[[redacted]]] transmit classical music. At least [[[redacted]]] transmit alternative/AAA music. TX 3038; Ploeger WRT ¶ 46 n.38. Moreover, at least [[[redacted]]] channels – [[[redacted]]] – transmit folk music. TX 3038.

licensees transmitting secular genres – including [[[redacted]]] – also paid commercial usage fees for two or more months during the term. *Id.* Another jazz music channel – [[[redacted]]] – approached the 159,140 monthly ATH threshold last year, transmitting [[[redacted]]] ATH in February and [[[redacted]]] ATH in June. *Id.* If commercial fees similar to those in place now are imposed above the 159,140 monthly ATH threshold for the 2021-2025 term, all noncommercial stations or channels – some of which transmit precisely the same genres of music as stations under the NPR Agreement – would continue to be subject to excess fees that are disparately higher than those charged to NPR-affiliated stations.

D. They Key Underpinning Used To Justify Charging Commercial Rates to Noncommercial Webcasters Above the ATH Threshold – Alleged Listener Cannibalization – Is Unlikely and Unsupported.

201. The core concern animating the current rate structure was not convergence – i.e., noncommercial entities negotiate in the same market with "the same willingness to pay" as commercial entities – but cannibalization – listeners switching from commercial to noncommercial webcasts. 8/26/20 Tr. 4004:3-4005:5 (Steinberg); *Web IV*, 81 Fed. Reg. at 26392 ("[T]here must be limits … to avoid 'the chance that small noncommercial stations will cannibalize the webcasting market more generally … ."' (quoting *Web II*)); Steinberg AWDT ¶¶ 23-25; *id*. ¶ 42 ("In Web IV, the Judges identified the threat of cannibalization as the reason for applying commercial rates to NCEs for listenership above the ATH threshold."). "One might rephrase the cannibalization point as 'although NCEs constitute a distinct submarket at any level ATH, this submarket endangers the commercial submarket when ATH is large.'" *Id.* ¶ 25. The cannibalization concern reflects only "the seller's perspective" rather than what willing noncommercial buyers and sellers would negotiate. 8/26/20 Tr. 4004:24-4005:5 (Steinberg). As

shown below, however, "the cannibalization argument is unsupported by the record and unlikely to occur." Steinberg AWDT ¶ 25.

1. Significant Noncommercial Cannibalization of Commercial Webcast Listeners Is Unlikely To Occur.

a. Nonprofit Objectives and Constraints Render Significant Cannibalization Unlikely.

202. Important differences between commercial and noncommercial entities in their objectives and constraints all minimize the possibility that listeners will be drawn from commercial to noncommercial webcasting. *Supra* Part III; Steinberg AWDT ¶¶ 13-22, 58.

203. The commitment to mission of noncommercial broadcasters translates into important differences between the programming of noncommercial broadcasters and commercial webcasters that make it unlikely that charging lower license fees to noncommercial broadcasters will lead to cannibalization. Cordes CWDT ¶ 16 (music plays secondary role to mission for a nonprofit broadcaster); *id*. ¶ 19 (mission focus affects "fundamental character of" noncommercial broadcast programming); *id*. ¶ 26; 47 C.F.R. § 73.503(a), (d) (noncommercial broadcast programming must be "educational," "nonprofit," and "noncommercial" in nature); 8/31/20 Tr. 4763:12-13 (Burkhiser) ("[W]e make all of our programming decisions based on our … mission."); Steinberg AWDT ¶ 49 (acknowledging possibility "that the cross-price elasticity between the submarkets is negative (indicating some degree of substitutability among listeners)" but opining that it is not "very large" given commercial and noncommercial programming differences); 8/20/20 Tr. 3278:1-10 (Cordes) ("[T]he fact that [noncommercial broadcasters] do, in fact, offer a differentiated product, means that … listeners to commercial broadcasters, which offer very different kind of programming, might not necessarily be drawn to what the non-commercial broadcaster is offering …."); 8/31/20 Tr. 4764:11-24 (Burkhiser) ("[T]here's a big

difference in … the programming content based on the two different drivers, profit or mission."); *supra* Part III.A.2.b.

204. "[N]oncommercial [broadcast] programming includes many mission-oriented elements other than music," which differentiates it from online-only commercial music services like Pandora. Cordes CWDT ¶ 29; Burkhiser WDT ¶¶ 11-13; 8/31/20 Tr. 4752:2-10 (Burkhiser). "Even the music that is chosen to be played is chosen for mission-driven reasons rather than commercial popularity." Cordes CWDT ¶ 29; 8/31/20 Tr. 4752:20-4753:1 (Burkhiser) ("It's all based on whether the … Bible is reflected or reformed theology is reflected … in the message. So we are very careful about the music we choose. We don't choose it based on popularity but the content. And we even reject music … if the content, even if it's Christian, isn't within those guidelines.").

205. The lack of commercial advertising in noncommercial broadcast programming preserves its educational nature and further differentiates it from commercial programming, which has a distinct, "profit-infused flair" and "different feel," making significant cannibalization unlikely. 47 C.F.R. § 73.503(d); 8/26/20 Tr. 3997:9-22 (Steinberg); Steinberg AWDT ¶ 52 ("FCC regulations requiring NCEs to advance an[] educational program and restricting NCE advertising revenues provide a strong presumption that the two submarkets do not overlap."); 8/31/20 Tr. 4764:5-24 (Burkhiser).

206. Moreover, noncommercial broadcasters' mission focus, reduced access to funding, and lack of owners to capture any surplus result in an aversion to competition and instead cause noncommercial broadcasters to seek out unserved markets with respect to their mission" rather than seeking to compete with a similar commercial broadcast station already in a particular market for listeners or dollars. 8/20/20 Tr. 3265:4-16 (Cordes); 8/26/20 Tr. 4008:9-23 (Steinberg); *accord* Cordes CWDT ¶ 16 ("The commitment to mission rather than profit means

that nonprofit organizations do not actively seek and indeed may have an aversion to competing with for-profit firms in the same industry.”). Given the differences in music selection – *i.e.*, mission and message versus profit-maximization – differences in overall program content, and the aversion to competition with commercial entities exhibited by noncommercial broadcasters, it is unlikely that a listener to a commercial webcaster, including even a commercial Christian radio station, would find noncommercial programming to be readily substitutable.

b. Noncommercial Broadcasters Pursue Different Types of Listeners than Commercial Services.

207. Mr. Orszag claims that commercial and noncommercial webcasters compete for the same listeners when they provide similar programing. Orszag WRT ¶ 162. This assertion, however, ignores not only the significant programming differentiation between these two segments but also the different reasons why each segment may choose to reach certain listeners and the aversion to competition with commercial service that noncommercial services have. *See supra* Part III.A.2.b.

208. Commercial and noncommercial broadcasters and other services seek listeners based on different motivations. Given the profit-maximizing goal of commercial broadcasters, they seek listeners who will best increase advertising revenues. Commercial webcasters:

> want to maximize the number of listeners because this helps them earn revenues from advertising. And their programming decisions are based on maximizing listenership in the demographic groups most attractive to advertisers.

8/26/20 Tr. 3999:3-10 (Steinberg). For example, a web page from even a commercial Christian radio station Pulse 101.7FM describes itself as an “advertising outlet” and tells advertisers that:

> We target 18-34 year old females. And research shows that we’re effectively reaching that target. While men and women of all ages listen to Pulse 101.7FM, our strength is communicating to women in this age category. She is the one responsible for almost all buying decisions in her family …. We can help you connect with her!

TX 3072 at 1.

209. Noncommercial broadcasters, by contrast, "seek listeners who will best advance their mission." 8/26/20 Tr. 4007:19-22 (Steinberg). For noncommercial religious broadcasters, "missions differ across nonprofits, but they generally involve either educating them about their faith, supporting them in their faith, or other such things." *Id.* at 3999:19-22. In Family Radio's case, its mission to its listeners is "to serve our broadcast communities by encouraging, educating, and inspiring our listeners with biblical and practical truths, ministering to their needs, and spurring them to lead more fulfilling lives." Burkhiser WDT ¶ 32.

210. One would not expect noncommercial broadcasters to enter markets where their mission is adequately pursued by others:

> The way the mission enters this is there are lots of markets that might be profitable that the non-commercial stations are not interested in entering.
>
> If there's already someone who is doing what they believe in, in terms of reinforcing faith or preaching, there is no point in going into that market. They are looking for unserved markets with respect to their mission.

8/26/20 Tr. 4008:9-23 (Steinberg); *accord* Cordes CWDT ¶ 16 ("The commitment to mission rather than profit means that nonprofit organizations do not actively seek and indeed may have an aversion to competing with for-profit firms in the same industry.").

211. Mr. Orszag points to Prazor as a prime example of a noncommercial service that allegedly competes for listeners with commercial webcasters, and Sirius XM in particular. Orszag WRT ¶ 159. But Prazor is a service focused on offered Christian music, whereas Sirius XM operates only three Christian music channels out of over 100 total music channels and several hundred total channels overall. TX 4000 at 2-4; *see also* Blatter WDT ¶¶ 7-9. Moreover, over the period from January 2016 through August 2019, Prazor transmitted only [[[redacted]]] ATH per month on average – just [[[redacted]]]% of the monthly ATH threshold – in months for which it reported [[[redacted]]]. Even in the month of highest usage across all [[[redacted]]] channels, it only

reported [[[redacted]]] ATH – only [[[redacted]]]% of the threshold. TX 3038. With such [[[redacted]]] listenership, Prazor is hardly a competitive threat to Sirius XM Radio, which reported nearly [[[redacted]]] performances and nearly $[[[redacted]]] in royalty payments in 2018 alone. TX 3030. Contrary to Mr. Orszag's assertion, it is highly unlikely that record companies would "be mindful of the potential for competition" between these two different services, with vastly different listenership and vastly different offerings, in a way that would materially affect the license fee it was willing to offer to Prazor. *See* Orszag WDT ¶ 159.

c. Listener Diversion Between a Noncommercial Broadcaster's Online and Over-the-Air Identical Programming Is More Likely and Would Increase, Not Decrease, Record Company Royalties.

212. It is more likely that listener diversion would occur between a noncommercial broadcaster's simulcast programming and its identical over-the-air broadcast programming than between the simulcast programming and a different commercial entity's webcast:

> The biggest diversion that I expect is that, if we make webcasting less costly to stations, they are less likely to limit their webcasting, so that some people who would have liked to listen on the Web, but have to listen to the broadcast of the same material, would be able to now switch to listen to that.

8/26/20 Tr. 4011:20-4012:1 (Steinberg). When such switching occurs, it enhances, rather than decreases, record company royalties, even at a very low noncommercial rate:

> So how does that affect things? Well, they've moved from listening to something that results in no royalties, over-the-air broadcasts, to listening to something that produces royalties.

Id. at 4012:2-5; 17 U.S.C. §§ 106(6), 114(a), (d)(1)(A).

213. Noncommercial simulcast listening also could come from those "who never listened to webcasting before, a brand new listener" or from listeners to a different radio broadcaster's over-the-air programming (either noncommercial or commercial), both of which

also would enhance the value of the digital sound recording performance right. 8/26/20 Tr. 4011:15-19, 4012:2-9 (Steinberg); 17 U.S.C. §§ 106(6), 114(a), (d)(1)(A).

214. In addition, listening could come from other noncommercial simulcasts, which would have no effect on record company revenues. 8/26/20 Tr. 4012:10-11 (Steinberg). Only where listeners to noncommercial programming previously listened to commercial webcast programming would cannibalization that reduces record company royalties possibly occur. Steinberg AWDT ¶ 47.

215. Given the greater likelihood of noncommercial-to-noncommercial listener substitution within the same market segment – and particularly substitution between identical noncommercial broadcast and simulcast programming – as well as other forms of substitution having a positive or neutral effect on the value of the performance right, there is no basis to presume that net cannibalization by noncommercial broadcasters will reduce record company revenues (even if that were the applicable standard). *Id.* ¶¶ 13-22, 25, 48, 58; 8/26/20 Tr. 4011:20-4012:5 (Steinberg).

2. The Current Rate Structure Is Premised on the Unsound Assumption of Listener Cannibalization High Enough To Outweigh the Enhanced Record Company Royalties from the Additional Fees that More Noncommercial Buyers Would Pay If Their Rate Were Lower.

216. Charging noncommercial webcasters the same per-performance rate above the ATH threshold necessarily is premised on the assumption that the sound recording digital performance right will be devalued by above-threshold noncommercial performances due to cannibalization unless those performances are charged at 100% of the commercial rate. *See Web II*, 72 Fed. Reg. at 24097 (citing SoundExchange expert for assertion that cannibalization of "the webcasting market more generally" will "adversely affect the value of the digital performance

right in sound recordings"); Harrison WDT ¶ 80 (supporting charging noncommercial entities commercial fees above the threshold to "ensure[] that our recordings are monetized fairly").

217. Even if commercial and noncommercial programming were identical in every way, which they are not, and 100% net listener cannibalization services would occur, which it wouldn't, noncommercial buyers and sellers – including even monopoly sellers – still would negotiate lower rates for above-threshold performances in an effectively competitive marketplace due to the market segmentation, and resulting lower willingness to pay, of noncommercial webcasters:

> And what would happen in a natural marketplace is that separate deals would be struck at different rates between the two market segments.
>
> In my original testimony, I quoted from the textbook I used to teach, Introductory Economics, that as long as different groups of customers respond differently to the price, a monopolist will find that it can capture more consumer surplus and increase its profit by charging them different prices.
>
> Now, one very important point because there is a lot of complications that confuse the issue. This is a separate argument from whether they produce an identical product.
>
> Even if the webcasters play identical songs in an identical context, whether they are commercial or non-commercial, as long as there is different willingness to pay, there's a different market segment, and we would naturally expect different prices in each segment.

8/26/20 Tr. 4002:6-24 (Steinberg). Professor Steinberg further testified that with a single statutory price, record company surplus:

> is diminished by the necessity of attracting willing buyers from both the commercial and NCE submarkets when the latter have lower willingness to pay for performance licenses. In contrast, when two statutory prices are set, one for each submarket, the price set for commercial webcasters can be the same as the single price, while the NCEs are charged a lower price and hence buy more licenses. When more licenses are sold, the value of digital performance rights increases.

Steinberg AWDT ¶ 46. In other words, and absent a litigation-driven concern about precedent, even with identical products, SoundExchange still would collect – and sound recording copyright owners would receive – the same or greater royalties if the noncommercial market segment were charged a lower per-performance rate due to the additional noncommercial buying activity that would occur. *Cf.* TX 2182 at 7 (SoundExchange cautioning record labels that entering into "[d]irect deals could provide a precedent … and undermine recording artists and record labels by establishing artificially low royalty rates.").

218. If lower marginal noncommercial rates do not cause significant numbers of listeners to switch from commercial to noncommercial stations, record company statutory royalties collected from commercial services are not reduced. Steinberg AWDT ¶ 47.

3. There Is No Empirical Proof of Significant Cannibalization in the Record.

219. The record is devoid of meaningful analysis or empirical studies or other substantial evidence showing that noncommercial cannibalization is occurring, let alone that it is significant. *Id.* ¶ 48 ("[T]here is no scientific study in the record demonstrating that cannibalization has ever occurred in this market."); 8/26/20 Tr. 4006:17-21 (Steinberg) ("So the record gives no scientific studies, a few anecdotes, a few people with opinions, but nobody has ever quantified the extent of cannibalization. Nobody has ever shown that it's significant in the numerical sense.").

220. SoundExchange's economist, Mr. Orszag, acknowledged that he "didn't conduct any empirical studies or surveys of end users or listeners" in this case "to assess whether they, in fact, differentiate between non-commercial and commercial programming." 8/13/20 Tr. 1990:1-11 (Orszag).

221. Witnesses on behalf of the three largest record company sellers of the right at issue also were unaware of any studies conducted by their companies to assess whether alleged noncommercial cannibalization was a problem. Despite the introduction of numerous studies

regarding commercial services, none of these witnesses was able to identify a single noncommercial study. For example, Ms. Reni Adadevoh, Warner Music International's Vice President, Legal and Business Affairs, acknowledged that she was "not aware of any studies that Warner ha[d] conducted to assess the extent to which non-commercial services compete with or divert listeners from commercial services." 9/3/20 Tr. 5599:17-21 (Adadevoh).

222. Similarly, Aaron Harrison, Universal Music Group's Senior Vice president of Business and Legal Affairs, Digital, admitted that he was not aware of Universal having ever "conducted any studies or analysis regarding the alleged substitut[]ability or listener diversion behaviors between non-commercial and commercial webcasters." 9/3/20 Tr. 5740:14-18 (Harrison). Nor was he aware of any Universal studies or analyses "regarding the type of programming offered by non-commercial religious simulcasters versus commercial religious simulcasters" or of "how non-commercial religious simulcasters select their programming versus how commercial religious simulcasters select their programming." *Id*. at 5741:1-11. And despite supporting SoundExchange's proposal to charge noncommercial webcasters full commercial rates above the ATH threshold, Mr. Harrison acknowledged that "Universal does not rely on any other objective data to inform its view on whether non-commercial digital services should be charged the same rate as or a different rate than commercial digital services for listenership above the ATH threshold." *Id*. at 5740:19-25; Harrison WDT ¶ 80.

223. Sony Music Entertainment ("SME") appeared similarly unconcerned about alleged noncommercial cannibalization. Jennifer Fowler, SME's Senior Vice President of Commercial and Marketing, conceded that she was "[[[redacted]]]." 9/2/20 Tr. 5444:7-14 (J. Fowler). Mark Piibe, SME's Executive Vice President, Global Business Development and Digital Strategy, admitted that while he had been involved in

"[[[redacted]]]," he could not "[[[redacted]]]" or their impact "[[[redacted]]]." 9/2/20 Tr. 5394:25-5395:18 (Piibe). Nor did he recall any commercial webcaster ever having "[[[redacted]]]." *Id*. at 5396:25-5397:3.

4. Record Evidence Indicates that Noncommercial Simulcasting Enhances, Rather than Cannibalizes, Record Companies' Streams of Revenue.

224. If anything, record evidence indicates that noncommercial broadcasters simulcasting enhances, rather than cannibalizes, record companies' streams of revenue. When Family Radio decreased its broadcast footprint by 50 signals from 2015-2018, which made simulcasting the sole means for those displaced listeners to access its ministry, its streaming listenership increased over that same period by 74%. Burkhiser WDT ¶¶ 29, 34; 8/31/20 Tr. 4758:12-22 (Burkhiser). Even more to the point, it experienced an "immediate" and "incredible" increase specifically in its online listenership from Buffalo, New York shortly after it sold a station serving that city:

> [W]hen we sold our Buffalo, New York station, it was incredible the increase, the immediate increase, that we found in streamers from Buffalo after that broadcast footprint was no longer there.

Id. at 4758:16-4759:2.

225. While not directly related to noncommercial broadcasting, a survey conducted by Professor John Hauser on behalf of NAB showed that commercial simulcast listeners were more likely to switch to commercial broadcast programming than any other form of listening if the simulcast were no longer available. Hauser WDT ¶ 108; Leonard CWDT ¶ 106 ("[T]he specific alternative [to radio simulcast listening] that was selected by the largest percentage of respondents, 25.3%, was listening to live AM/FM radio broadcasts from commercial radio

stations through a radio."). As NAB's economist, Greg Leonard, testified, "This alternative notably would not trigger a royalty to the record label in the no-license world." *Id*. Thus, general and specific empirical evidence that speaks to this point shows that at least a substantial portion of simulcast listenership adds to – rather than subtracts from – record companies' bottom lines.

5. Alleged Overlap in Sound Recordings Played Does Not Support Cannibalization.

a. Overlapping Music Played on Two Services, Without More, Does Not Suggest that Listener Diversion Is Likely.

226. There is no reason to expect significant listener cannibalization merely if a noncommercial service plays sound recordings that overlap with those played on particular commercial services, as Mr. Orszag suggests (Orszag WRT ¶¶ 158-62) – especially where those services are radio broadcasters. Rather, as Professor Steinberg testified, "playing the same songs in and of itself does not indicate that … cannibalization occurs." 8/26/20 Tr. 4009:17-25 (Steinberg).

227. If two radio broadcasters are "are playing the same songs, but they are in different geographic locations, if they are attracting different audiences, they are not stealing from each other." *Id.* at 4010:1-5. There is substantial evidence that simulcast listenership overwhelmingly comes from the geographic area where the underlying radio station is located. As Mr. Emert explained, "The vast majority of our listeners are local, which is precisely who we aim to serve. […] a large majority of our stream listeners are ones whom ***NewLife FM*** already is able to reach over the air, without having to pay SoundExchange for their listening." Emert WDT (*Web IV*) ¶ 28; *accord* Newberry WDT ¶ 18 ("Indeed, for all but the largest and most famous radio stations, the vast majority of simulcast listening happens within the station's market."). Given that these two simulcasters would overwhelmingly reach listeners in different geographic

locations, the risk of cannibalization is small. 8/26/20 Tr. 4010:1-5 (Steinberg). And as noted in *supra* Part VIII.D.1.b, noncommercial and commercial services pursue different types of listeners, which renders cannibalization more unlikely.

228. Moreover, as Professor Cordes observed:

> the mere fact that a particular sound recording might be heard on both a noncommercial broadcaster and Pandora or a commercial broadcast stream ignores the overall content and context of the programming in which the music occurs. It is this context that offers listeners quite different listening experiences and thereby removes the chance that they would be indifferent between the two listening experiences.

Cordes CWDT ¶ 29. Professor Steinberg similarly observed:

> And the music is not the only thing that makes people listen. If we have an all-music station competing with a music and preaching or teaching station, they are not the same product. People don't automatically switch. And, more importantly, when I hear a song in a context, the song has meaning. It has effect. Music is a powerful manipulator of beliefs, emotions, and faith. And so when I hear the same song on a station that's playing only music or on a station that is using the music to make a point, to emphasize a point in the talk, they are two different products.

8/26/20 Tr. 4010:6-18 (Steinberg). For noncommercial broadcast programming in particular, which includes significant talk and teaching content aimed at advancing that broadcaster's mission, and does not include the advertisements so prevalent even in commercial Christian broadcast programming, this content is a critical differentiator that renders listener cannibalization unlikely.

b. The Playlist Overlap Study Using Mediabase Data Does Not Demonstrate Listener Cannibalization and Does Not Demonstrate Differences in Commercial/Noncommercial Overlap Between NPR and Non-NPR Broadcasters.

(1) Flaws in Study

229. SoundExchange witnesses also attempted to suggest competition for listeners, and by implication listener cannibalization, through a playlist overlap study using radio station data from Mediabase that Messrs. Ploeger and Orszag both discussed. Ploeger WRT ¶ 25;

Orszag WRT ¶ 158. The study purported to compare the sound recordings played by a collective group of ten commercial stations versus a collective group of ten noncommercial stations in a calendar quarter that were drawn from the stations that Mediabase happened to monitor. Ploeger WRT ¶ 25. The study, however, suffered from so many flaws as to be meaningless.

230. *First*, Messrs. Ploeger and Orszag were unaware of basic information concerning how the study was designed, or even who specifically designed it. Neither Mr. Orszag nor Mr. Ploeger conducted the study themselves (Massarsky Consulting did), and Mr. Ploeger "was not in the room" even to participate in the decisionmaking process to design the study. 9/9/20 Tr. 5846:8-12 (Ploeger); 8/13/20 Tr. 2019:2-5 (Orszag). Mr. Ploeger did not know who the primary contact that SoundExchange dealt with at Massarsky Consulting was, and Mr. Orszag was not even able to confirm that Massarsky Consulting had conducted the study. *Id.* at 2019:6-14; 9/9/20 Tr. 5845:24-5846:3 (Ploeger).

231. Moreover, Mr. Ploeger did not know whether SoundExchange considered performing an overlap study that was broader than just Christian AC, nor did he know who made the decision to look at only Christian AC stations. *Id.* at 5847:2-20. He also did not know why 10 stations were chosen and not a different number or why a calendar quarter was chosen and not a different length of time. *Id.* at 5847:21-5849:8. Despite being the primary witness to testify about it, he was not part of the actual study's creation. *Id.* at 5849:2-14. No one from Massarsky Consulting was available to testify about it at the hearing. *Id.* at 5846:4-7.

232. *Second*, Mr. Orszag himself admitted that the study did not purport "to replicate the real world in behavior of consumers." "It's not something [he] tackle[d] in this matter." 8/13/20 Tr. 2039:5-8 (Orszag). Therefore, it cannot be used to infer anything about listener behavior.

233. *Third*, the study monitored only a single format of music despite the existence of many genres of music, both religious and secular, transmitted by noncommercial services. Ploeger WRT ¶¶ 25, 44; 8/13/20 Tr. 1971:14-1972:6 (Orszag); 8/31/20 Tr. 4752:13-17 (Burkhiser); 9/9/20 Tr. 5797:20-5798:9 (Ploeger). Neither Mr. Ploeger nor Mr. Orszag knew how many radio stations Mediabase monitored, and Mr. Ploeger did not know which formats were monitored other than the Christian AC format he discussed or how many of the Christian AC stations were commercial. *Id.* at 5844:6-9, 5844:18-5845:12; 8/13/20 Tr. 2023:23-2024:2 (Orszag). Mr. Orszag agreed that the 76 Christian AC stations that Mediabase monitors are not representative of the universe of all noncommercial and commercial religious stations in the U.S. *Id.* at 2026:1-17. As such, the study shows nothing about overlap in any other genre.

234. *Fourth*, even within the Christian AC format, the pool of 76 commercial and noncommercial Christian AC stations monitored by Mediabase was not shown to be representative of the broader universe of such stations in the U.S. Ploeger WRT ¶ 25; 8/13/20 Tr. 2025:5-25 (Orszag). Mr. Orszag did not know how many Christian stations operate in the U.S. but acknowledged that "[i]t's a very large number." *Id.* at 2023:23-2024:5. Mr. Ploeger was not aware how Mediabase decides which stations to monitor among the much broader universe. 9/9/20 Tr. 5845:13-19 (Ploeger).

235. *Fifth*, each group of ten Christian AC stations was not representative of all respective commercial or noncommercial religious stations in the U.S. 8/13/20 Tr. 2027:9-16, 2028:9-20 (Orszag). Mr. Orszag also did not present any information in his testimony indicating that the respective commercial and noncommercial groups of ten Christian AC stations drawn from the stations Mediabase monitors were a representative sample of the universe of those categories of Christian AC stations in the U.S. *Id.* at 2026:18-2027:8, 2027:17-2028:8.

236. Moreover, no information was provided regarding how the random selection of stations was performed within each group, and Mr. Ploeger was unable at the time of his deposition to describe how that random selection was performed. Ploeger WRT ¶ 25; 9/9/20 Tr. 5849:15-21 (Ploeger). He testified that the initial list of twenty stations was not an equal amount of commercial and noncommercial stations, but he did not know which the greater number was. *Id.* at 5850:5-5851:3. He also was not able to describe how Massarsky Consulting redrew to get an even number. *Id.* at 5851:4-8.

237. Mr. Ploeger also admits that of the ten commercial stations, five – fully half – were owned by the same company – Salem. *Id.* at 5851:9-21. Mr. Orszag did "nothing to test empirically whether the effect of a single owner owning a big chunk of those stations would bias the analysis." 8/13/20 Tr. 2029:8-13 (Orszag). Moreover, Salem does not even broadcast primarily in a Christian AC (aka CCM) – or even a music – format. Rather, only twelve (12) of Salem's 100 stations nationwide broadcast that format; fully seventy-six (76) air some form of talk or teaching programming. TX 3049.

238. *Sixth*, not a single pair of stations used in the study operated in the same market, so listeners to the stations largely would not overlap or pose risk of cannibalization in any event. Ploeger WRT App. C. There is no way to know from this study whether stations operating in the same market of listeners would play the same songs during similar times of day, week, and quarter.

239. *Seventh*, the study only measured whether the same song was ever played by at least one station in each group over a three-month period; it did not measure whether overlap was typical or whether it occurred at similar times of day, week, or quarter. 8/13/20 Tr. 2032:5-19 (Orszag). All plays of a song were counted as overlapping if only a single commercial station played a song once in the quarter but many noncommercial stations played the song

hundreds of times, or vice versa. *Id.* at 2032:15-2033:1. "[A] sound recording could have been played one time on one station on the first day of the calendar quarter and lots of times on lots of stations throughout the calendar quarter in the other group and all of those plays would have been counted as overlapping … ." *Id.* at. 2032:20-2033:1. Similarly, "[a] recording could have been played … only on weekdays in one group of stations and then only on weekends in the other group of stations and, again, all the plays of both groups of that song would be counted as overlapping." *Id.* at 2033:2-7.

240. *Eighth*, the study did not measure similarities or differences in any programming other than sound recordings played and thus did not test the context in which a song is presented. Mr. Orszag admittedly "did not examine all of the information that a listener would have in the context that that listener would listen to religious stations in the marketplace" but rather looked only at "recordings in one format of Christian music." *Id.* at 2039:23-2040:10. This is the very "context that offers listeners quite different listening experiences and thereby removes the chance that they would be indifferent between the two listening experiences." Cordes CWDT ¶ 29. Taken together, these fatal shortcomings with the overlap study render it wholly uninformative on the question of alleged listener cannibalization.

(2) Failure of Study To Compare Alleged Noncommercial/Commercial Musical Overlap Among Religious Stations with that Among NPR Stations

241. Given the NPR benchmarks on which the NRBNMLC relies, an equally fatal deficiency in the overlap study is that SoundExchange did not conduct a study to test commercial/noncommercial overlap of any musical genre played on NPR stations. When a benchmark approach is used, no absolute promotion/substitution/cannibalization adjustments are necessary, as these effects are baked into the benchmark rates. *Web IV*, 81 Fed. Reg. at 26326; *accord Web II*, 72 Fed. Reg. at 24092. Rather, "relative promotion, not absolute

promotion/substitution, is the relevant factor in … consideration of statutory rates." *SDARS III*, 83 Fed. Reg. at 65214. "[B]ecause only the relative difference between the benchmark market and the hypothetical target market would necessitate an adjustment, the absence of solid empirical evidence of such a difference obviates the need for such further adjustment." *Web II*, 72 Fed. Reg. at 24095.

242. Here, SoundExchange did not study noncommercial/commercial overlap for any NPR stations:

> JUDGE RUWE: So you did not do a similar analysis across the commercial playlists for NPR? We'll just keep it at NPR.
>
> THE WITNESS: Not to my knowledge, no.

9/9/20 Tr. 5806:16-19 (Ploeger). SoundExchange easily could have done so as part of its rebuttal case. Professor Steinberg in his written direct testimony had identified the NPR Agreement as an "example[] of the type[] of agreements that noncommercial organizations negotiate," described the agreement in detail, opined that it "could be adjusted to serve as a starting point for developing Web V [noncommercial] fee structures, and said that it "provides a useful starting point for rate setting". Steinberg AWDT ¶¶ 30, 33-39. It did not, however, so there is no way to know whether overlap is similar or different and no basis on which to adjust for differences.

243. Moreover, NPR stations broadcast plenty of formats – including adult alternative, jazz, and classical – that are also transmitted by commercial entities. TX 3035; 9/9/20 Tr. 5842:14-17 (Ploeger) ("Q. Adult alternative, classical, and jazz music are all genres of music played on NPR stations, aren't they? A. They – they are, yes. I believe they are."). Pandora, for example, offers some 27 classical stations (not counting listener generated stations), 30 jazz stations, and 41 alternative stations. *See* TX 3069. Sirius XM's channel lineup also lists numerous adult alternative, classical, and jazz stations. *See* TX 4000 ("Classic Alternative,"

"'90s Alternative/Grunge," "New Alternative Rock," "Smooth/Contemporary Jazz, "Classic Jazz," "Opera/Classical Vocals," and "Classical Music"). Moreover, SoundExchange commercial reporting data identifies additional such services where it is apparent on their face that they transmit in one of these genres, including [[[redacted]]]." TX 3030. There are likely many others. Absent any information regarding quantified relative differences in noncommercial/commercial overlap between NPR and non-NPR station, the overlap study is wholly uninformative to how, if at all, the NPR benchmarks should be adjusted to account for any promotional or substitutional effect.

6. The NPR Agreement Demonstrates that Record Companies Have Been Willing To Accept Much Lower Rates from Noncommercial Broadcasters Despite Claims of Cannibalization.

244. Mr. Orszag attempts to justify charging above-threshold commercial rates to noncommercial entities by claiming that a willing seller would not sell its product at a lower price to a noncommercial webcaster "that would take market share away from commercial webcasters." Orszag WRT ¶ 162. But the NPR Agreements themselves demonstrate that record companies have been willing to reach agreements with even larger noncommercial broadcasters at rates that are significantly lower on average than the current noncommercial rates. TX 3020, 3021.

245. Mr. Ploeger argues that one genre of religious music played by some noncommercial religious broadcasters – contemporary Christian music – also is played by certain commercial webcasters. Ploeger WRT ¶¶ 17-26. But as demonstrated in *supra* Part VIII.D.5.b(2), NPR stations themselves play many genres of music also played on commercial services, including adult alternative, classical, and jazz. *Compare* TX 3035 *with* TX 3069 (Pandora genres identifying adult alternative, classical, and jazz stations) *and* TX 4000 (Sirius XM channels listing same genres).

246. Moreover, much of the evidence cited in *Web II* concerning alleged cannibalization when the threshold structure was first introduced related to NPR member station practices. *See, e.g.*, *Web II*, 72 Fed. Reg. at 24098 ("Public and collegiate radio stations no longer necessarily face a limited geographic audience, but rather their music programming is geographically unbounded … ."); *id*. ("[S]ome Noncommercial Webcasters, such as NPR, may view Commercial Webcasters as their competition for audience …. "). Indeed, the very threshold first set in that case of 159,140 monthly ATH was chosen based on a 2004 NPR survey. *Id*. at 24099 ("According to that survey, the NPR stations averaged 218 simultaneous streaming listeners per station (or the equivalent of 159,140 ATH per month).").

247. Yet despite NPR stations serving as the poster child when above-threshold commercial rates were first imposed, and despite many stations – even as of *Web II* – transmitting more than 159,140 monthly ATH, NPR stations have never had to bear the brunt of those payments. Rather, willing seller record companies through SoundExchange consistently have agreed to accept lower payments from NPR in *Web II* and every rate proceeding since. *See 2008 WSA Agreement Rates*, 74 Fed. Reg. at 9294-99 (2005-2010); *2009 WSA Agreement Rates*, 74 Fed. Reg. at 40620-24 (2011-2015); TX 3021 (2016-2020); TX 3020 (2021-2025). If willing record company sellers were genuinely concerned about alleged cannibalization above the threshold from larger noncommercial broadcasters, they would not have agreed to accept lower rates from NPR stations.

E. Charging Noncommercial Webcasters a Lower Marginal Rate Above the Threshold Would Not Encourage Noncommercial Services To Compete with Commercial Services.

248. Setting lower marginal rates for noncommercial webcasting above the ATH threshold would not incentivize noncommercial licensees to compete with commercial services. As Professor Cordes testified:

> [B]ecause listeners of noncommercial broadcasters do not pay fees to stream music, charging noncommercial broadcasters a lower rate would not affect the relative price of listening online to a noncommercial broadcaster's programming rather than to the programming of a commercial service such as Pandora or a commercial broadcaster. Thus, it is unclear how charging noncommercial broadcasters a lower rate would lead them to increase their market share of listeners at the expense of commercial services.

Cordes CWDT ¶ 31; 8/20/20 Tr. 3273:25-3274:10 (Cordes).

249. Moreover, "both the commitment to mission and the nondistribution constraint would create strong incentives for noncommercial broadcasters to reinvest cost savings resulting from lower rates into maintaining and enhancing their ability to serve their mission." Cordes CWDT ¶ 32. As Professor Cordes testified:

> [W]hile it certainly is true that lower fees would increase the financial resources of a non-commercial broadcaster, the operative question is what would it do with those additional financial resources.
>
> And here, once again, commitment to mission plays a very important role because if a deed is committed to mission, yes, it would welcome those additional resources but it would effectively plow them back into the maintenance and the enhancement of mission.
>
> It would not, for example, either desire or be able to take that extra cash, if you will, and use it to enhance the bottom line or increase shareholder value.

8/20/20 Tr. 3274:11-25 (Cordes).

F. SoundExchange's Claim that Average Noncommercial Rates Reflect a "Discount" from Commercial Fees Is Economically Irrelevant to Whether Noncommercial Rates Are Those that Noncommercial Buyers Would Negotiate with Sellers.

250. SoundExchange witnesses have claimed that the current noncommercial rates nonetheless represent an average discount from commercial rates given the initial ATH threshold allotment. Orszag WRT ¶¶ 148-51; Ploeger WRT ¶¶ 33-38. That claim, however, compares apples with oranges, as noncommercial and commercial webcasters occupy different market segments. *See supra* Part III; 17 U.S.C. § 114(f)(1)(B) (requiring rates to "distinguish among the different types of services then in operation").

251. Marginal rates, not average rates, are what drive behaviors in the marketplace. Professor Tucker acknowledged that "[[[redacted]]]" and that "[[[redacted]]]." 8/17/20 Tr. 2206:23-2207:9 (Tucker). She also agreed that "[[[redacted]]]." *Id.* at 2207:13-2208:4. Ms. Burkhiser confirmed that marginal rates drive Family Radio's behavior: "when Family Radio makes … business decisions about whether or not to … impose … limits on streaming," it does not look at the average rate it pays overall but the marginal "usage rate" it is charged for webcasting to additional listeners. 8/31/20 Tr. 4774:6-16 (Burkhiser).

252. The current noncommercial rates do not reflect a discount but a very significant surcharge as compared with the fees charged to NPR-affiliated noncommercial broadcasters, which are in the same market segment. *See supra* Part II.D; 17 U.S.C. § 114(f)(1)(B (requiring rates to "distinguish among the different types of services then in operation").

G. A Harmful Mission-Obstructing Side Effect Arises from Charging Noncommercial Licensees Commercial Rates Above the ATH Threshold.

253. Charging larger non-NPR noncommercial broadcasters and webcasters commercial rates above the ATH threshold instead of rates more in line with those charged to NPR-affiliated stations presents a mission-obstructing dilemma that NPR stations do not have to face to the same degree. Noncommercial broadcasters may either:

a. continue to pursue their mission fully but at the cost of having to raise additional scarce funds from their donors to provide the same level of ministry; or

b. compromise their core mission by curtailing access to their programming.

Steinberg AWDT ¶ 26; Burkhiser WDT ¶ 37.

254. Family Radio's experience with this harmful side effect of having to pay commercial rates upon reaching a certain level of listenership has been particularly acute:

> It has really created a catch-22 for us because when we were broadcasting to listeners, serving them in our educational Bible-centered way, we didn't have to pay anything in sound recording performance royalties. But when they migrated to streaming, when they can no longer hear us over the air, then we started to have to pay for sound recording performance royalties. So our dilemma was enable them to still hear us on-line, diverting donor funds to pay the fees that we didn't have to pay before, to still serve the displaced listeners and impede our mission, or limit the on-line listenership, limit their access to our ministry, which also impedes our mission. So really quite a dilemma.

8/31/20 Tr. 4760:6-20 (Burkhiser); *see also* Emert WDT (*Web IV*) ¶ 38 ("It is obviously not ideal for a noncommercial religious broadcaster to turn listeners away from their programming, as it works against our mission of reaching as many people as we can with our message of hope and inspiration ….").

255. There is no basis in the record to believe that larger non-NPR noncommercial broadcasters in an effectively competitive market would negotiate marginal fees equal to commercial fees that force them to face this mission-compromising dilemma, particularly when NPR-affiliated noncommercial broadcasters were able to negotiate rates that relieved them from having to do so. As Ms. Burkhiser testified:

> [W]hile we appreciate the threshold, the steep jump in rates … has been very harmful and difficult to us. And we certainly … would not seek out commercial rates above a certain threshold.
>
> Rather, … we would appreciate having … usage rates above the threshold be lower than commercial, just because … we're so different in character and nature and purpose. All the things … I've talked about before, and we'd also really like to be treated with parity … with NPR.

8/31/20 Tr. 4770:13-4771:3 (Burkhiser); *see also* Steinberg AWDT ¶ 30, 34 (observing that NPR Agreement provides useful starting point for non-NPR noncommercial fees).

IX. SOUNDEXCHANGE'S PROPOSED RATES WOULD DEVIATE FURTHER FROM WILLING BUYER/WILLING SELLER RATES AND EXACERBATE THE NPR FEE DISPARITY.

A. SoundExchange's Proposed Noncommercial Rates Would Increase Already Above-Market Noncommercial Per-Performance Rates by Another 55%.

256. On top of the gap between the current rates and those that willing noncommercial buyers would agree to with sellers in the marketplace, SoundExchange proposes to widen that gap further. Not only does it seek to double the $500 annual minimum fee,[15] but it seeks to increase the above-market noncommercial above-threshold per-performance rate by another 55%. *Compare* 37 C.F.R. § 380.10(a)(2) ($0.0018 per performance) *with* Proposed Rates and Terms of SoundExchange, Inc. and Artist and Copyright Owner Participants at 21 (Sept. 23, 2019) ($0.0028 per performance) ("SE Rate Proposal"). If adopted, this 55% increase would come on top of the noncommercial fee doubling that occurred between 2015 and 2016. *Compare 2009 WSA Agreement Rates*, 74 Fed. Reg. at 40626 ($0.00083/performance) *with Web IV*, 81 Fed. Reg. at 26400 ($0.0017/performance); Burkhiser WDT ¶ 28.

257. SoundExchange's noncommercial rate proposal, like the current noncommercial rate structure, is not based on a single agreement with a noncommercial buyer but is a seller-side demand. *See* Orszag WDT ¶ 184; 8/13/20 Tr. 2004:4-8 (Orszag).

258. SoundExchange's fee proposal also would widen the already yawning fee gap between the prices that non-NPR noncommercial broadcasters and NPR noncommercial broadcasters pay for comparable amounts of sound recording usage, which is based solely on whether a noncommercial broadcaster chooses to affiliate with NPR. For the group of noncommercial licensees paying usage fees on at least one channel, their total fees under

[15] SoundExchange's minimum fee proposal is addressed in Part III.B of the Services' Joint PFFCL, which the NRBNMLC joins in its entirety.

SoundExchange's proposed rates would be $[[[redacted]]], which would cover [[[redacted]]] ATH if one assumes 12 performances per ATH and full usage of the minimum fee ATH allotment.[16] Ploeger WRT App. E; SE Rate Proposal. The average per-ATH price is thus $.0087 ($[[[redacted]]]). The price per ATH under the 2021-2025 NPR Agreement is $0.0022 in 2021 ($800,000 / 360,000,000 ATH) and decreases to $0.002 in 2025 ($800,000 / 400,000,000 ATH). TX 3020 at 7-9. Under these assumptions, the fee disparity thus would increase from **283%** (*supra* Part II.D) to a range of **392% to 436%** (before any cost-of-living increases are factored into SoundExchange's proposed rate, which would increase the disparity). In other words, SoundExchange's proposed increase to noncommercial rates moves apart from, not closer to, noncommercial willing buyer/willing seller rates as evidenced by the NPR Agreements.

B. Professor Tucker's Claim that a Handful of Noncommercial Services Are Supposedly "Well-Positioned" To Pay SoundExchange's Proposed Rate Is Irrelevant and Unfounded.

259. Professor Tucker attempts to justify SoundExchange's proposal to increase sharply noncommercial rates by claiming that the five noncommercial broadcasters who paid the most in above-threshold per-performance fees are "well-positioned" to pay those fees, but that analysis is irrelevant to the willing buyer/willing seller standard and not supported by the data she cites. Tucker WDT ¶ 167.

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[16] The [[[redacted]]] channels in this group of broadcasters would pay $[[[redacted]]] under SoundExchange's Rate Proposal. Usage fees of $[[[redacted]]] at $0.0018/performance represent [[[redacted]]] performances ($[[[redacted]]] / $0.0018/performance). Ploeger WRT App. E. Under SoundExchange's proposal, [[[redacted]]] above-threshold performances would be charged $[[[redacted]]] in royalties ($[[[redacted]]] * $0.0028/performance). SE Rate Proposal at 21. The total fee for this group under SoundExchange's rate proposal thus would be $[[[redacted]]].

Minimum fees paid by this group of broadcasters covered [[[redacted]]] ATH ([[[redacted]]] channels * 159,140 ATH/month * 12 months / year). At 12 sound recordings/ATH, [[[redacted]]] above-threshold performances is [[[redacted]]] ATH. Total ATH represented by this group is [[[redacted]]] ATH.

260. For the reasons set forth in Part II.E.1 of the Services' Joint PFFCL (which the NRBNMLC joins), Professor Tucker's "ability-to-pay" analysis is irrelevant to the willing buyer/willing seller inquiry. As the Register of Copyrights made clear in *Web I*:

> The law requires only that the Panel set rates that would have been negotiated in the marketplace between a willing buyer and a willing seller. It is silent on what effect these rates should have on particular individual services who wish to operate under the license. Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates. It only needed to assure itself that the benchmarks it adopted were indicative of marketplace rates.

Web I, 67 Fed. Reg. at 45254; *accord Web IV*, 81 Fed. Reg. at 26316, 26318 (observing that *Web II* Judges rejected ability-to-pay analysis in favor of "a review of market benchmarks" for commercial services). Professor Tucker's review of high-level finances of the top above-threshold noncommercial broadcasters is wholly uninformative of the rates that noncommercial buyers and sellers would agree to in an effectively competitive marketplace.

261. Professor Tucker admitted as much in the hearing, agreeing that she is "not giving an opinion on the appropriateness of any particular rates" and hadn't "considered the rates that would result from a non-commercial willing buyer/willing seller negotiation in an effectively competitive market." 8/18/20 Tr. 2471:1-12 (Tucker). She also didn't "offer opinions on how non-commercial webcasters would approach a willing buyer/willing seller negotiation," doesn't "consider [her]self an expert on the differences in the structure and operations of for-profit versus nonprofit companies" or "on non-commercial radio simulcast programming content." *Id.* at 2473:17-24, 2474:5-15.

262. Moreover, the figures that she did cite for the top five noncommercial licensees were highly misleading, as those entities are all [[[redacted]]]. Tucker WRT App. 3; 8/18/20 Tr. 2484:20-22, 2485:1-5 (Tucker). Professor Tucker did not attempt to [[[redacted]

[redacted]]], and she acknowledged that these [[[redacted]]]." *Id.* at 2485:17-2486:11.

263. She also acknowledged that she "[[[redacted]]]." *Id.* at 2493:10-17. She was "[[[redacted]]]," and she didn't "[[[redacted]]]." *Id.* at 2493:18-2494:17. She did not analyze in her testimony the finances of "[[[redacted]]]. *Id.* at 2497:12-25. She also didn't "know the amount of annual revenues of the average non-commercial entity whose only operation is webcasting" and didn't consider in [her] testimony whether those entities would be profitable or unprofitable." *Id.* at 2498:7-21.

264. Professor Tucker's ability-to-pay assertion was particularly off-base with respect to [[[redacted]]]. That entity is primarily a university rather than a broadcaster – much less a simulcaster – and incurs expenses associated with salaries, upkeep, athletic and other extracurricular activities, and the like. *Id.* at 2487:1-5, 2487:20-2488:12. While [[[redacted]]]'s reported revenues in its 2018 Form 990 were substantial, the vast majority of those – some $72 million – related to its operation of a university with "[[[redacted]]]" and "[[[redacted]]]." *Id.* at 2490:13-17, 2491:5-11; TX 5240 at 13 ([[[redacted]]] 2018 Form 990). Professor Tucker acknowledged that

[[[redacted]]] reported $54 million in expenses in connection with its university operations and thus experienced a surplus of $18 million. 8/18/20 Tr. 2491:5-16 (Tucker); TX 5240 at 2.

265. [[[redacted]]]'s "[[[redacted]]]," and thus "[[[redacted]]]." 8/18/20 Tr. 2491:17-2492:2 (Tucker). Those figures were much smaller than [[[redacted]]]'s university finances and included "[[[redacted]]]" as well as salaries. *Id.* at 2492:3-10. Professor Tucker further acknowledged that the figures associated with simulcasting specifically would be even smaller. *Id.* at 2492:11-2493:6. Thus, even taking Professor Tucker's irrelevant financial review at face value, the numbers she uses are vastly overinclusive and wholly uninformative regarding these nonprofit organizations' revenues and expenses associated specifically with simulcasting. The analysis does not support – as Professor Tucker herself acknowledged – the proposition that SoundExchange's proposed noncommercial rates remotely resemble those that would be negotiated in an effectively competitive market.

X. TERMS

266. SoundExchange's proposal to require reporting of International Standard Recording Codes ("ISRCs") is not properly considered in this proceeding. Ploeger WRT ¶ 77 & App. A ¶¶ 116-22. The Judges commenced a rulemaking to address precisely such reporting issues, and that rulemaking remains pending. *See* Docket No. 14-CRB-0005 (RM). "The forum for that request is the rulemaking, not this proceeding." *Web IV*, 81 Fed. Reg. at 26404; *see* also The NRBNMLC's Proposed Noncommercial Webcaster Rates and Terms at 1 n.1 (July 31, 2020) (identifying rulemaking proceeding and ISRC-related broadcaster arguments.[17]

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[17] Other terms-related issues are addressed in the Joint PFFCL, which the NRBNMLC incorporates by reference.

CONCLUSION

For the foregoing reasons and those set forth in the Joint PFFCL, the Judges should adopt the NRBNMLC's Rate Proposal and reject SoundExchange's proposed rates and terms for noncommercial webcasters.

Respectfully submitted,

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October 15, 2020

Appendix A

This Appendix is Restricted in its entirety and is therefore omitted from the Public Version of this filing.

Proof of Delivery

I hereby certify that on Friday, October 16, 2020, I provided a true and correct copy of the THE NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE COMMITTEE'S CORRECTED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

National Association of Broadcasters, represented by Sarang V Damle, served via ESERVICE at sy.damle@lw.com

Sony Music Entertainment, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

UMG Recordings, Inc., represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Sirius XM Radio Inc., represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Educational Media Foundation, represented by David Oxenford, served via ESERVICE at doxenford@wbklaw.com

Jagjaguwar Inc., represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

SAG-AFTRA, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

American Federation of Musicians of the United States and Canada, The, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

American Association of Independent Music ("A2IM"), The, represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Google Inc., represented by Kenneth L Steinthal, served via ESERVICE at ksteinthal@kslaw.com

Warner Music Group Corp., represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

SoundExchange, Inc., represented by David A. Handzo, served via ESERVICE at dhandzo@jenner.com

Signed: /s/ Elizabeth E Craig